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Supreme Court, U.S.
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In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Appendix A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED App. 0411P (6th Cir.)
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORIS SIMMONS-HARRIS; MARLA FRANKLIN; STEVEN BEHR, Rev.; SUE GATTON; MARY MURPHY; MICHAEL DEBOSE; CHERYL DEBOSE; GLENN ALTSCHULD; DEIDRA PEARSON, *Plaintiffs-Appellees,*	:	Nos. 00-3055/ 3060/3063
v.	:	
SUSAN TAVE ZELMAN, Superintendent of Public Instruction, State of Ohio, et al., *Defendants-Appellants (00-3055/3060),*	:	
SENEL HERMAN TAYLOR, et al., *Intervenors-Defendants-Appellants (00-3055),*	:	
HANNA PERKINS SCHOOL, et al., *Intervenors-Defendants-Appellants (00-3063).*	:	

Appeal from the United States District Court
For the Northern District of Ohio at Cleveland.
Nos. 99-01740, 99-01818—Solomon Oliver, Jr.,
District Judge.

Argued: June 20, 2000

Decided and Filed: December 11, 2000

Before: RYAN, SILER, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Clint Bolick, INSTITUTE FOR JUSTICE, Washington, D.C., Edward B. Foley, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, David J. Young, SQUIRE, SANDERS & DEMPSEY, Columbus, Ohio, for Appellants. Robert H. Chanin, BREDHOFF & KAISER, Washington, D.C., Marvin E. Frankel, KRAMER, LEVIN, NAFTALIS & FRANKEL, New York, New York, for Appellees. **ON BRIEF:** Clint Bolick, Matthew Berry, INSTITUTE FOR JUSTICE, Washington, D.C., David C. Tryon, PORTER, WRIGHT, MORRIS & ARTHUR, Cleveland, Ohio, Edward B. Foley, Karen L. Lazorishak, Roger F. Carroll, James G. Tassie, Mary Lynn Readey, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, David J. Young, Michael R. Reed, SQUIRE, SANDERS & DEMPSEY, Columbus, Ohio, for Appellants. Robert H. Chanin, Andrew D. Roth, BREDHOFF & KAISER, Washington, D.C., David G. Latanick, CLOPPERT, PORTMAN, SAUTER, LATANICK & FOLEY, Columbus, Ohio, Elliot M. Mincberg, Judith E. Schaeffer, PEOPLE FOR THE AMERICAN WAY,

Washington, D.C., Raymond Vasvari, ACLU OF OHIO FOUNDATION, INC., Cleveland, Ohio, Steven K. Green, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., Marvin E. Frankel, KRAMER, LEVIN, NAFTALIS & FRANKEL, New York, New York, for Appellees. William E. Thro, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, M. Reed Hopper, PACIFIC LEGAL FOUNDATION, Sacramento, California, Paul Clement, KING & SPALDING, Washington, D.C., Victoria W. Ni, REBOUL, MACMURRAY, HEWITT, MAYNARD & KRISTOL, New York, New York, Joshua R. Cohen, KAHRMAN, JACKSON & KRANTZ, Cleveland, Ohio, Nicholas A. Pittner, BRICKER & ECKLER, Columbus, Ohio, for Amici Curiae.

CLAY, J., delivered the opinion of the court, in which SILER, J., joined. RYAN, J. (32-53), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Defendants and Intervenors Dr. Susan Tave Zelman, *et al.*; Senel Taylor, *et al.*; and Hanna Perkins School, *et al.*, appeal from the order entered by the United States District Court for the Northern District of Ohio, enjoining on summary judgment the Ohio Pilot Project Scholarship Program on the ground that it violates the Establishment Clause of the First Amendment. For the following reasons, we **AFFIRM.**

I.

In 1995, Ohio's General Assembly adopted the Ohio Pilot Project Scholarship Program ("voucher program" or

"the program") in response to an order by the United States District Court that placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement by the local school board. The voucher program covers any state school district that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." Ohio Rev. Code § 3313.975(A). The program provides scholarships to children residing within the applicable district in grades kindergarten through eighth grade. *See* Ohio Rev. Code § 3313.975(C)(1). The program gives "preference to students from low-income families," defining them as those whose families' income is less than 200% of the poverty line. *See* Ohio Rev. Code § 3313.978(A). "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual, 1-11 (J.A. at 1358) (emphasis original). Over sixty percent of the children receiving scholarships in the program are from families with incomes at or below the poverty line.

The voucher program pays scholarships according to family income. The program requires participating private schools to cap tuition at $2500 per student per year and pays 90% of whatever tuition the school actually charges for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875. *See* Ohio Rev. Code §§ 3313.976(A)(8), 3313.978(A). Each scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. Ohio Rev. Code § 3313.979. Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.

Schools wishing to be designated as program participants eligible to enroll scholarship students must register with the voucher program. Private schools located within the boundaries of the Cleveland school district which meet the State's educational standards may participate. *See* Ohio Rev. Code § 3313.976(A)(1) and (3). Schools are required to follow the program's priority rules regarding the placement of students and may not discriminate on the basis of race, religion, or ethnic background; advocate or foster unlawful behavior; or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion. *See* Ohio Rev. Code § 3313.976(A)(6). Public schools in districts adjacent to the district in which the voucher program is implemented may also register for the program and "receive scholarship payments on behalf of parents," but none of the public schools in districts adjacent to Cleveland have done so. Ohio Rev. Code § 3313.976(C). The checks for program participants at public schools are made out to the participating school district rather than to the parents. No public schools have registered for the program since its enactment.

For the 1999-2000 school year, 3,761 students enrolled in the program; 60% of the enrollees are from families at or below the poverty level. Of these, 3,632 (96%) are enrolled in sectarian schools. At one time in the course of the program, as many as 22% of the students enrolled in the program attended nonreligious schools. During the 1999-2000 school year, fifty-six schools registered to participate in the program; forty-six (82%) are church-affiliated. Program monies may be used by the participating schools for whatever purpose they deem appropriate; the voucher program does not place restrictions on the use of funds made available under the program.

The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services; interweaving of Christian doctrines with science and language arts classes; requiring that "all learning take place in an atmosphere of religious ideals," St. Vincent de Paul School, Parent Handbook 11 (1999-2000); and designing educational scholarship in order "to make ... faith become living, conscious, and active through the light of instruction ... religious truths and values permeate the whole atmosphere of the school." Saint Rocco School, Parent-Student Handbook 1 (1999-2000). Other sectarian schools in the voucher program believe that "the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier," Saint John Nottingham Lutheran School, Parent Handbook 2 (1999-2000); and to require students to "pledge allegiance to the Christian flag and to the Savior for whose Kingdom it stands, One Savior crucified, risen and coming again with life and liberty for all who believe." Calvary Center Academy, Parent-Student Handbook 24 (1999-2000).

In prior litigation, Doris Simmons-Harris, one of the Plaintiffs herein, brought a state court lawsuit challenging the constitutionality of the voucher program under multiple provisions of the Ohio Constitution, and under the Establishment Clause of the United States Constitution. On May 27, 1999, the Ohio Supreme Court issued a judgment in favor of Plaintiffs, holding that the 1995 voucher program had been enacted in violation of the one-subject rule of the Ohio Constitution, and "must be stricken" from the Ohio statute books. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). However, a majority of the justices

rejected Plaintiffs' claims that the program violated the Establishment Clause. *Id.* at 207-11, 218-19. Those justices reasoned that "[t]he *Nyquist* holding [had been] undermined" by subsequent cases and was thus no longer good law. *Id.* at 208. A concurring opinion noted that "[w]ith regard to the rest of the majority opinion [the section not dealing with the one-subject rule], ... I find a number of the other assertions by the majority to be advisory in nature." *Id.* at 216 (Douglas, J., joined by Resnick and Sweeney, JJ., concurring in the judgment only). Since this case, the Ohio Legislature has re-enacted the voucher program in a manner remedying the one-subject problem; however, the 1999 program is in all relevant aspects, the same as the original pilot scholarship program enacted by the Legislature in 1995.

On July 20, 1999, Simmons-Harris, the parent of a minor child enrolled in the Cleveland City School District for the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvado Church in Lorain, Ohio, filed suit in Case No. 1:99cv1740, against Defendant Dr. Susan Tave Zelman in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education, seeking to enjoin a portion of the program on the ground that it violated the Establishment Clause of the First Amendment. On July 29, 1999, Sue Gatton, chair of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glen Altschuld, Ohio Taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District, filed suit in Case No. 1:99cv1818 against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent; the State of Ohio through its General Assembly, Governor and other agents; and Saundra Berry, in her official capacity as Program

Administrator of the Ohio Pilot Scholarship Program, seeking the same injunctive relief as in Case No. 1:99cv1740.

Proposed Intervenors Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock, on their own behalf and as natural guardians of their respective children, filed an answer to Simmons-Harris' complaint on July 27, 1999. Proposed Intervenors Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Delores Jones, filed an answer to Simmons-Harris' complaint on August 2, 1999.

On August 13, 1999, the district court held a preliminary injunction hearing in both cases, and on August 24, 1999, granted Plaintiffs the injunctive relief sought. In the same order, the district court consolidated the two cases, and found that the Ohio Supreme Court's decision in *Simmons v. Goff*, 711 N.E.2d 203 (Ohio 1999), did not preclude federal consideration of the constitutional challenge to the voucher program because the Ohio court's decision rested on a state ground which independently supported its resolution of the case. Thereafter, on August 27, 1999, the district court granted in part Defendants' motion for a stay of the preliminary injunction.

On August 24, 1999, the same day that the district court granted Plaintiffs' motion for a preliminary injunction, the State and the two intervening Defendants appealed that decision to this Court. After the district court's August 27, 1999, order granting a limited stay of its preliminary injunction, all Defendants filed revised briefs with this Court, appealing the preliminary injunction with regard to students who were new to the voucher program—i.e., the portion of the preliminary injunction not stayed by the district court's

August 27, 1999 order. While those appeals were pending, the State filed a motion for a stay of the preliminary injunction with the United States Supreme Court, which the Supreme Court granted by a vote of 5-4 on November 5, 1999, pending this Court's final disposition of the entire appeal. *See Simmons-Harris v. Zelman*, 120 S. Ct. 443 (1999). Thereafter, this Court entered an order on November 15, 1999, concluding that the Supreme Court's decision granting the State's motion for a stay rendered moot Defendants' pending motions for a stay in this Court. The case proceeded in the district court on an expedited basis.

On October 15, 1999, all parties stipulated that the handbooks, mission statements and brochures of the schools participating in the Cleveland scholarship program are "authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or misleading. Some of these documents however may not accurately reflect admission standards that had to be revised." Plaintiffs and Defendants both filed motions for summary judgment on November 1, 1999.

On November 29, 1999, the district court denied Intervenor Taylor's motion to have the following question certified to the Ohio Supreme Court: "Does Ohio law give preclusive effect to the resolution of the Establishment Clause claim in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999)?"

The district court granted Plaintiffs' motion for summary judgment on December 20, 1999, finding that the voucher program violated the Establishment Clause; enjoined Defendants from administering the program; and denied Defendants' motion for summary judgment. *See Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 836 (N.D. Ohio 1999). The court stayed its summary judgment order with Plaintiffs'

consent pending review by this Court. Defendants and Intervenors appealed to this Court on January 12, 2000.

II.

We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us.

The courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another. The design or specifics of a program intended to remedy the problem of failing schools and to rectify educational inequality must be reserved to the states and the school boards within them, with one caveat: the proposed program may not run afoul of the freedoms guaranteed to all citizens in the Constitution. In other words, the determinations of states and school boards cannot infringe upon the necessary separation between church and state. We therefore consider the program presented before us under the controlling precedents of the United States Supreme Court and this Court to determine whether such infringement has occurred.

This Court reviews the district court's grant of summary judgment *de novo*. *See Coles v. Cleveland Bd. of Educ.*, 171 F.2d 369, 376 (6th Cir. 1999). Summary

judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion...." U.S. Const., amend. I. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Supreme Court set forth the following test to determine whether a statute passes muster under the Establishment Clause: 1) the statute must have a secular legislative purpose; 2) the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and 3) the statute must not foster excessive entanglement with religion. If a statute fails any portion of this test, it violates the Establishment Clause. *Id.* The Supreme Court has applied the *Lemon* test regularly in the context of schools and education. *See, e.g., Kiryas Joel Sch. Dist. v. Gromet*, 512 U.S. 687 (1994) (drawing a separate school district for one religion violates the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1989) (posting Ten Commandments on walls of public school violates Establishment Clause); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (holding that Establishment Clause does not prevent religious organizations from participating in federally funded program); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (overturning statute which required the teaching of Creationism in public schools); *Aguilar v. Felton*, 473 U.S. 402 (1985) (paying public school employees to teach in parochial school violates the Establishment Clause), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Grand*

Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (finding a shared time program to be a violation of Establishment Clause), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Mueller v. Allen*, 463 U.S. 388 (1983) (permitting taxpayers to deduct from state income tax expenses incurred in sending children to parochial schools does not violate Establishment Clause); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (finding no violation of Establishment Clause in providing government aid to both public and private universities).

The Supreme Court and individual justices have introduced variations on the *Lemon* test in other contexts. *See Lee v. Wiseman*, 505 U.S. 577, 592-98 (1992) (using coercion test developed by Justice Kennedy to hold that school could not provide for nonsectarian prayer to be given at graduation by school-selected clergyman); *County of Allegheny v. ACLU*, 492 U.S. 573, 594-602, 655-79 (1989) (using two-part test developed by Justice O'Connor—Establishment Clause is violated when 1) government is excessively entangled with religion, or 2) government endorses or disapproves of religion—as part of the *Lemon* test regarding government displays of objects with religious connotations; introducing Justice Kennedy's two-part coercion test – 1) government may not coerce participation in religion, and 2) government may not directly benefit religion – in his concurrence); *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985) (using Justice O'Connor's two-part test as part of the *Lemon* analysis and finding it appropriate to determine whether the government's purpose is to endorse or disapprove of religion); *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (introducing Justice O'Connor's two-part test).

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court reaffirmed the importance of the *Lemon* test in Establishment

Clause cases involving school aid, but noted that the entanglement prong could be considered as an aspect of the effects inquiry. *Agostini* found "three primary criteria" used by the Court in evaluating whether government aid has the effect of advancing religion: whether the statute or programs in question "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234.

The Supreme Court has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses. Although in *Agostini*, the Court articulated the primary criteria it would utilize to determine whether a government-aid program impermissibly advanced or endorsed religion, the Court has not necessarily limited itself to considering solely those criteria. Rather, it seems evident that the *Agostini* Court illustrated the *Lemon* test's flexibility and its evolution from the relatively rigid three-part test to an approach in which the varying components of a particular program or statute are analyzed with regard to their impact on, in the context of schools, the relevant students or communities. We therefore look to these components as aspects of the proper analysis under *Lemon*, but acknowledge that precedent does not limit itself to only these components should other components previously utilized by the Court be relevant, such as coercion of citizens, endorsement of religion, and direct benefit to religion. *See Mitchell v. Helms*, 120 S. Ct. 2530, 2556 (2000) (O'Connor, J., concurring) (finding that *Agostini* represents a general framework for approaching questions concerning neutral school-aid programs but recognizing that these types of cases depend on the particular facts of each case).

Of the cases which follow *Lemon*, we find the most persuasive, in that it is on point with the matter at hand, to be *Committee for Public Education v. Nyquist*, 413 U.S. 756

(1973). In *Nyquist*, a New York State statute established, among other aid, a tuition grant program which provided for partial tuition reimbursement to low-income parents whose children attended private elementary or secondary schools. *See id.* at 761-70. The tuition reimbursement plan applied to parents of children who attended any private school, not solely sectarian schools, and was limited to 50% of tuition paid. *Id.* at 764. At the time the plan was challenged, nearly 20% of New York's school-age children attended nonpublic schools, and approximately 85% of these schools were sectarian. *Id.* at 768. The *Nyquist* Court noted that although "the characteristics of individual schools may vary widely from [the] profile," institutions which qualified for assistance under the statute were ones that included religious instruction and requirements as part of their academic curriculum. *See id.* at 767-68.

Following *Lemon*, the *Nyquist* Court found that the New York statute passed the first prong of the *Lemon* test—whether the statute had a secular purpose—because the tuition reimbursement program promoted pluralism and diversity among New York's public and private schools, and alleviated concern that the State's overburdened public schools would be harmed if a large number of children who had previously been attending private schools decided to return to the public schools. *See* 413 U.S. at 773. The Court did "not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren." *Id.*

Under the second prong of the *Lemon* test—that the statute neither advance nor inhibit religion—the New York statute did not fare as well. The Court next found that the New York reimbursement program failed because "[I]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for

secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780. The Court opined that the fact that program grants were delivered to parents rather than schools was "only one among many factors to be considered." *Id.* at 781. The Court rested its analysis on the premise that there had been "'no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.'" *Id.* at 783 (quoting *Lemon*, 403 U.S. at 613). "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools." *Id.* The Court noted that "while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.*

The *Nyquist* Court also recognized and discarded the state's arguments that it was of controlling significance that New York's program called for reimbursement of tuition already paid, thus ensuring that the parent is free to spend that tuition money in any manner he or she sees fit. 413 U.S. at 785-86. "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated.... Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same." *Id.* at 786. The Court also rejected the state's argument that the plan paid for only a portion of the tuition at a sectarian school, saying "if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools." *Id.* at 787.

The cases of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968) were carefully distinguished by the Court. In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools, reasoning that the bus fare program was analogous to the provision of services such as police and fire protection, sewage disposal, highways and sidewalks for parochial schools. *See* 330 U.S. at 17-18. The Court found that these services, common to all citizens, are "so separate and so indisputably marked off from the religious function, that they may fairly be viewed as reflections of a neutral posture toward religious institutions." *Id.* at 18. In *Allen*, the Court upheld a statute which allowed secular textbooks to be provided to children attending religious schools, finding that "the State claims no right to distribute religious literature," and noting that "we cannot assume that school authorities ... are unable to distinguish between secular and religious books." 392 U.S. at 244-45. The *Nyquist* Court distinguished these two cases not only based on their neutral posture toward religion, but on the fact that in both of those cases, "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38, (citing *Tilton v. Richardson*, 403 U.S. 672 (1970) (making federal aid available to all institutions of higher learning)).

The Court noted that unlike in *Everson* and *Allen*, the tuition grants in *Nyquist* were not a neutral attempt to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools, as the "grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools totally at state expense." 413 U.S. at 782 n.38 (internal quotations marks omitted). The Court additionally determined that this argument of neutrality, if upheld, would

be overly broad, providing "a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause." *Id.*

The Supreme Court has revisited many of the issues raised in *Nyquist*. In *Agostini v. Felton*, 521 U.S. 203, 237 (1997), the Court stated that "[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent." The Court continued to reaffirm "that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls*, leaving to this Court the prerogative of overruling its own decisions." *Id.* (emphasis added). The Supreme Court has refrained from overruling *Nyquist*, and has instead distinguished various cases on the basis of their facts; this Court has accordingly followed that approach. "A single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition." *Coles*, 171 F.3d at 376. We therefore look to relevant case law to assist us by analogy in analyzing the factual discrepancies between this case and *Nyquist*.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court found constitutional a Minnesota statute which allowed state taxpayers to deduct on their state income tax certain tuition, transportation and educational expenses of their children attending elementary or secondary schools. Following the *Lemon* test, the Court agreed that the statute had the secular purpose of defraying the cost of education for all parents, regardless of the type of school their children attend. *Id.* at

395. Analyzing the effect of the statute, the Court held that the program did not have a primary effect of advancing religion because the tax deduction was a traditional area for state legislatures to codify policies which "achieve an equitable distribution of the tax burden," and because the deduction was available for educational expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools, or church-affiliated schools. *Id.* at 396-98.

The Court found it compelling that the deduction was available for all parents with school age children, stating that this aspect was "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398. The Court analogized the tax deduction scheme as similar to the G.I. Bill, or other forms of "public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.* The Court found it significant that under the Minnesota plan, governmental aid was only channeled through the parents, rather than directly paid to the parochial institutions, and noted that it would not base the constitutionality of a statute on the consideration of yearly statistical evidence concerning which nonsectarian schools—religious or otherwise—benefitted from the tax deduction. *Id.* at 401. The Court stated that the Establishment Clause is not a bar to "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Supreme Court found constitutional a Washington State program which provided

vocational rehabilitation assistance grants to a blind individual who attended a Christian college in the hope of becoming a pastor. The Court found the statute's purpose "unmistakably secular," *id.* at 486, and found that unlike *Nyquist*, "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. The fact that the vocational assistance was paid directly to the student, who could expend the educational funds on "wholly secular education," persuaded the Court to find that the program did not create an incentive to apply the aid to religious education. *Id.* "Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.... Nothing in the record indicates that ... any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Id.* The Court also found that "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Id.* at 489.

In *Agostini v. Felton*, the Court held that the Establishment Clause did not bar a New York program which sent public school teachers into parochial schools to provide remedial education to disadvantaged children. Recognizing that there had been significant changes in Establishment Clause jurisprudence, the Court found that it could no longer presume "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. The Court noted that those direct aid programs where grants are "made available generally without regard to the sectarian-nonsectarian, or public-

nonpublic nature of the institution benefitted [are valid departures from the general rule] that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225. Relying on an earlier case which had found it permissible to place a public school sign language interpreter into a private parochial school under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, the Court determined that these instances involve situations where money ultimately goes to religious schools "only as a result of the genuinely independent and private choices of individuals." *Id.* at 225-26 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). The Court noted as a central part of its analysis that the services provided by public school employees were remedial, stating that the "services do not, therefore, reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 228. The Court concluded that the New York program services "are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school." *Id.* at 232.

The Supreme Court revisited this issue this past term. By a plurality, the Court upheld a program to loan educational materials and equipment to private religious schools which channeled federal funds through state agencies. *See Mitchell v. Helms*, 120 S. Ct. 2530 (2000). Writing for four justices, Justice Thomas concluded that the critical question in cases of government aid to religious schools is whether the government aid is neutral: whether it results from the genuinely independent and private choices of individual parents. *See id.* at 2541-44. Justice Thomas noted that the nexus between neutrality and private choice was the prominent, even the chief factor, in upholding government aid in *Agostini*, *Zobrest*, *Witters*, and *Mueller*, and found that there is a close relationship between private choice and the

question of whether a program creates a financial incentive to undertake religious schooling. *See id.* at 2543.

The opinion goes on to state that "[i]f aid to schools, even direct aid, is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion." 120 S. Ct. at 2544 (internal citations omitted). The opinion recognizes that there exist "special Establishment Clause dangers when money is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly." *Id.* at 2546 (internal citations omitted). In a footnote, Justice Thomas hypothesized "that the principles of neutrality and private choice would be adequate to address those special risks." *Id.* at 2547 n.8. He continued to find that at least in regards to *Nyquist*, the prohibition against direct payments was linked to "serious concerns about whether the payments were truly neutral." *Id.*

Although Justice O'Connor concurred in the judgment, she wrote separately in *Mitchell* based upon her belief that "the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs." 120 S. Ct. at 2556. Justice O'Connor's concurring opinion shows disagreement not only with the "expansive scope of the plurality's rule[,]" but with two specific aspects of its analysis. *Id.* First, she found the plurality's "treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs." *Id.* Second, she found "the plurality's approval of actual diversion of government aid to religious indoctrination is in

tension without precedents and ... unnecessary to decide the instant case." *Id.*

While agreeing with Justice Thomas that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," Justice O'Connor opined that "neutrality is not alone sufficient to qualify the aid as constitutional." 120 S. Ct. at 2557-58. She criticized Justice Thomas's opinion for relying on logic which would support direct government aid to religious organizations based on the number of persons belonging to each organization. "[T]he plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives." *Id.* at 2560. Justice O'Connor rejected an outright ban on any diversion of government funds to sectarian uses, but would enact a rule which requires plaintiffs to prove that the aid in question is, or has been, used for religious purposes, and found that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause." *Id.* at 2567.

Justice O'Connor concluded that because the school-aid program in *Agostini* was similar to that at issue in *Mitchell*, the *Agostini* criteria should control the outcome of the case; however, she noted that the "school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule." 120 S. Ct. at 2560.

In regard to *Mitchell* and its sharply divided plurality, we note that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the

judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Accordingly, we find that the opinion of Justice O'Connor is the narrower of the plurality, as it utilizes the standard of *Agostini* based on a factual similarity rather than creating a new standard centered on neutrality, thereby making its mandates controlling.

III.

We now apply the framework established by precedent to the case before us, recognizing the predominating theme in this area of law to be the need for careful judicial attention to the factual detail in the challenged statutory scheme.

At the outset, we note that Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant. Analyzing the scholarship program choices as compared to choices or schools outside the program is asking this Court to examine the entire context of Ohio education. Such a question is not before this Court. The Defendants' argument would rewrite the law to require that the courts look to all possible alternatives to a challenged program, thus visiting issues of legislative choice and educational policy which no plaintiff has raised.

At oral argument, Defendants asserted repeatedly that the Community Schools program should be considered coterminous with the voucher program, arguing that the programs are merely separate sections in the statute. However, the statutory record does not support this argument, except for perhaps the literal meaning that the two programs do indeed occupy separate sections in the Ohio Code. The school voucher program is enacted as a complete

program in the Ohio Revised Code. *See* Ohio Rev. Code §§ 3313.974-3313.983. The program is enacted as a part of the chapter on Boards of Education. *See* Ohio Rev. Code § 3313.01 *et seq*. Furthermore, the school voucher program, and only the school voucher program, was challenged by Plaintiffs in this lawsuit. In contrast, Community Schools program is codified in its own chapter. *See* Ohio Rev. Code §§ 3314.01 *et seq*. It is similarly a complete program within the Code: the statutory provisions govern all aspects of the program without reference to the voucher program. We may not view these two programs as inextricably interdependent when the plain language of the statutory scheme demonstrates the opposite. It is simply not the proper role of the courts to change statutory construction by judicial fiat. *See Brogan v. United States*, 552 U.S. 398, 408 (1998); *Nat'l Life and Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975) ("The Courts ... do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather it is their function to give the natural and plain meaning effect to statutes...."). Should we consider the Community Schools program in our analysis of the constitutionality of the school voucher program, we would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children. Such an analysis would expand our jurisdiction far beyond the case at hand; we are presented only with the question of whether the school voucher program violates the Establishment Clause, and we must limit ourselves to that issue, regardless of the temptations Defendants' arguments present.

We find that *Nyquist* governs our result. Factually, the program at hand is a tuition grant program for low-

income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio Statute at issue, parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefitted by these tuition dollars are sectarian. The *Nyquist* Court itself found there to be no distinction between "a reimbursement, a reward, or a subsidy, [as in all three,] the substantive impact is still the same." 413 U.S. at 786. As in *Nyquist*, the Ohio program contains no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Id.* at 780. Here, there is clearly "no endeavor to guarantee the separation between secular and religious functions and to ensure that State financial aid supports only the former." *Id.* at 783. In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds—the funds may be used for religious instruction or materials as easily as for erasers and playground equipment.

Despite the language of the statute, there is no evidence that the tuition vouchers serve as a neutral form of state assistance which would excuse the direct funding of religious institutions by the state, despite the statute's language. Admittedly, the voucher program does not restrict entry into the program to religious or sectarian schools, but facial neutrality alone does not bring state action into compliance with the First Amendment. *See Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. Practically speaking, the tuition

restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs. *See* Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999) (finding that voucher funding levels typically "approximate[] the tuition level set by parochial schools [which] reflects subsidies from other sources"). In fact, Defendants admit that there is incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program. *See* Brief of State at 10. The evidence illustrates this point in that 82% of participating schools are sectarian, just as in *Nyquist* where 85% of the participating schools were sectarian. Beyond that, we note that the number of available places for students in sectarian schools is higher than 82%, as many of the sectarian schools are larger and provide a greater number of places for children in the voucher program. Moreover, close to 96% of the students enrolled in the program for the 1999-2000 school year attended sectarian institutions.

The alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district. Per pupil expenditures in the public schools are backed by $7,097 in public funding. *See* Brief of Senel Taylor Intervenors at 17. At a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program. Since its inception, no public schools from outside Cleveland have registered in the school voucher program, and there are no spaces available for children who wish to attend a suburban public school in place of a private school under the program.

Therefore, the program clearly has the impermissible effect of promoting sectarian schools.

This is not the type of case which would fall into the exception to the *Nyquist* rules. Here, state assistance is only available to those students who attend private schools—the aid is clearly dependent on whether parents choose public or private schools. That the majority of places available in the program are for students attending sectarian schools is not unpersuasive. This program provides incentives for parents to choose schools other than mainstream public ones, but that choice does not extend to schools outside of the program. Students may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program. Rather, the program provides financial assistance for those parents who wish to place their children in the particular private schools, mostly religious, which take part in the program. We find such a scheme directly akin to *Nyquist's* offensive aid to only private school students, and not an instance where "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38. The effect of this program, like *Nyquist* and unlike *Mueller* and subsequent cases, is one where "public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Mueller*, 463 U.S. at 398.

Contrary to the tax deduction generally available in *Mueller*, the Ohio voucher program is available to curtail only those expenses which students attending certain private schools accrue. *See* 463 U.S. at 398 (distinguishing the *Mueller* program from that in *Nyquist* because in *Nyquist*, "tuition grants [were] provided only to parents of children in

nonpublic schools"). The idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program. The absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring.

In contradistinction to *Witters*, a student under the Ohio statute cannot apply state aid to any school he or she chooses, including public schools, since under the Ohio program, no public schools have enrolled, nor are likely to enroll. Similarly, *Agostini* is inapposite because the services made available to students at parochial schools through the placement of public school teachers to teach secular subjects were available to all qualifying students without regard to the nature of the institution they attended. 521 U.S. at 232 (finding that under the New York program at issue in *Agostini*, and unlike the *Nyquist* program, services "are available to all children who meet the Act's eligibility requirements no matter ... where they go to school). While the program upheld in *Mitchell* provided for the loan of instructional equipment by state agencies to both public and private schools, in this case aid predominantly flows directly to the coffers of religious institutions. Unlike *Mitchell*, under the Ohio statute, there are not "numerous private citizens who are free to direct the aid elsewhere" as the majority of the choices available to parents and students are religious institutions. 120 S. Ct. at 2533 (Thomas, J. plurality). The voucher program at issue constitutes the type of "direct monetary subsidies to religious institutions," that Justice O'Connor found impermissible in *Mitchell*. *Id.* at 2559-60 (O'Connor, J. concurring). This program is dissimilar to that upheld in both *Agostini* and *Mitchell*, as here aid goes only to

students enrolled in private schools, thereby fostering the type of government entanglement prohibited under the Establishment Clause.

To approve this program would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something "in tension" with the precedents of the Supreme Court. *Mitchell*, 120 S. Ct. at 2556. We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated. This scheme involves the grant of state aid directly and predominantly to the coffers of the private, religious schools, and it is unquestioned that these institutions incorporate religious concepts, motives, and themes into all facets of their educational planning. There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious.

We conclude that unlike *Mitchell*, *Agostini*, *Witters* and *Mueller*, the Ohio scholarship program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria. The effect of the voucher program is in direct contravention to these Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution. Accordingly, we hold that no genuine issue of material fact remains for trial that the voucher program has

the primary effect of advancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause. We therefore affirm the district court's order granting summary judgment to Plaintiffs.

IV.

Intervenor Taylor asserts that the district court erred by holding that the Ohio Supreme Court's opinion in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), did not estop Plaintiffs' claim, and by refusing to certify the question of estoppel to the Ohio Supreme Court. This Court reviews the issue of collateral estoppel as part of the summary judgment determination *de novo*. This Court reviews the district court's denial of certification for an abuse of discretion. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995).

Under both federal and state law, an "issue must have been necessary to support the judgment ... in the prior proceeding" in order to find collateral estoppel. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 376-77 (6th Cir. 1998); *accord MetroHealth Med. Ctr. v. Hoffmann-LaRoche, Inc.*, 685 N.E.2d 529, 533 (Ohio 1997) ("Issue preclusion precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action."); *cf. Ameigh v. Baycliffs Corp.*, 690 N.E.2d 872, 875 (Ohio 1998) ("Where the judgment of a court is not dispositive on issues which a party later seeks to litigate, *res judicata* is not applicable ... even if the prior court decision has discussed the issues that are the subject of the current litigation."). A determination is not essential to the judgment if the judgment could be supported by an adequate and independent state ground. *See Lambrix v. Singletary*, 520 U.S. 518, 522-24 (1997). In *Goff*, the Ohio Supreme Court

held that the 1995 school voucher program was enacted in violation of the one-subject rule of the Ohio Constitution, and on that basis, ordered the program in its entirety "stricken" from the Ohio statute books. 711 N.E.2d at 203. That ruling entitled the plaintiffs to the relief they requested, and therefore, any discussion of other grounds for striking or upholding the statute could be neither necessary nor essential to the holding. The Ohio Court determined that the entire program could not stand; therefore, any analysis as to the constitutionality of particular portions of the program was by definition advisory or dicta, and cannot be relied upon to bar further litigation. Because Plaintiffs would not be able to obtain Supreme Court review of the Ohio Supreme Court's determination as to the Establishment Clause, such determinations cannot constitute collateral estoppel. *See Cal. v. Rooney*, 483 U.S. 307, 311 (1987) (declining to review a Fourth Amendment ruling adverse to the state of California where that ruling was unnecessary to a judgment in favor of the state).

Similarly, the district court did not err in refusing to certify the question to the Ohio Supreme Court. The governing law as to whether a party is estopped from relitigating an issue not essential to the court's determination is clear and uncontroverted; we therefore find no abuse of discretion in the district court's determination.

V.

Before concluding, we must pause to briefly address the dissent, not for the purpose of dignifying its hyperbole, but to quash any putatively substantive argument which may have found its way through the gratuitous insults. The dissent first makes the bald-faced assertion that the majority has struck down the voucher program as unconstitutional without any "meaningful" independent analysis, and that the

majority simply concludes that the program is "foreordained" to be found unconstitutional under *Nyquist*. According to the dissent, the New York statute in *Nyquist* is "totally different" from the Ohio statute before us today, thus making it impossible to "take seriously" the majority's conclusion that *Nyquist* is controlling. However, even a cursory reading of the majority opinion clearly indicates that it is the dissent and its rhetoric which should not be taken seriously. As carefully set forth in Part III of this opinion, the Ohio statute at issue has the same effect as that of the New York statute held unconstitutional under the Establishment Clause in *Nyquist*. Both statutes have the impermissible effect of benefitting only students in particular private, and mostly religious, schools, irrespective of the illusory choice provided on the face of the Ohio statute. The fact that the dissent may not agree with the analysis set forth in the opinion to illustrate this point does not *ipso facto* render the analysis "meaningless."

Second, in a similar vein, the dissent claims that the majority reaches its conclusion that the voucher program is unconstitutional under the Establishment Clause without conducting any "meaningful" analysis into the Supreme Court's several cases on this issue since *Nyquist* was handed down. However, in Part II of this opinion, the majority painstakingly sets forth First Amendment Establishment Clause jurisprudence and its evolution since *Nyquist*, while carefully applying that law to the statute at hand in the following section. Again, it is obvious that the dissent's bald-faced assertion that this analysis not "meaningful" is apparently born out of nothing more than its disagreement with the outcome of this case, rather than with an objective observation. It is the majority which employs the evolving jurisprudential standards in reaching its outcome, while the dissent employs a rigid antiquated standard to reach its result driven outcome in contravention of the Supreme Court's

latest pronouncements.[1] *See, e.g., Agostini*, 521 U.S. at 222-26.

VI.

We recognize the importance of this case and the precedential value it espouses. Equally as important, we are aware of the critical nature of questions of educational policy, and the need to establish successful schools and academic programs for children. We find, however, that even more important is the need to uphold the Constitution of the United States and, in this case, to override the State of Ohio's statutory scheme where it constitutes an impermissible infringement under the Establishment Clause of the First Amendment. We there **AFFIRM** the district court's order finding the school voucher program unconstitutional, as well as the court's determination that Plaintiffs are not collaterally estopped.

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[1] Judge Ryan inappropriately calls for an *en banc* review of the matter in his dissent. There are rules and procedures governing a call for *en banc* review once a case has been decided, whether the call is made by a party or *sua sponte* by an active judge of this Court or member of the original panel, and it is the process contemplated by these rules and procedures which should be used to invoke *en banc* review after the Court's opinion has been issued. *See Craft v. CIR*, Nos. 99-1734, 99-1737, 2000 WL 1726906, at n.18 (6th Cir. Nov. 22, 2000) (criticizing the concurring opinion's exhortation for *en banc* review of the matter, while noting that Fed. R. App. P. 35(b) and 6 Cir. I.O.P. 35(c) set forth the appropriate procedures to follow when calling for such review). The unfortunate practice of arguing for *en banc* review of a case in a panel member's separate opinion—instead of simply permitting the Court's regular operating procedures for seeking such review to be followed subsequent to the issuance of the majority opinion—is one which should not be perpetuated.

CONCURRING IN PART, DISSENTING IN PART

RYAN, Circuit Judge, concurring in part and dissenting in part. My colleagues' resolution of the question presented by the plaintiffs' collateral estoppel claim is eminently correct and so I joint part IV of the court's opinion. However, because I believe Ohio's voucher program to be constitutional under the First Amendment and the Supreme Court's Establishment Clause cases interpreting the amendment, I must respectfully dissent from the majority's treatment of the voucher program's constitutionality.

My brothers have struck down as unconstitutional Ohio's effort to establish a school-choice voucher program whose primary purpose is to enable mostly minority poverty-level school children, in Cleveland, Ohio, to escape the devastating consequences of attending Cleveland's demonstrably failed public schools. My colleagues have done so not on the basis of any independent constitutional analysis of the Ohio Pilot Project Scholarship Program, as the voucher program is formally known, but because they claim the invalidity of the statute is a conclusion foreordained by the United States Supreme Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). I disagree. The New York statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects, both in their purposes and their provisions for carrying out their respective purposes. It is impossible to take seriously the majority's claim that *Nyquist* governs our result and, *for that reason*, requires that the Ohio voucher program must be struck down.

Moreover, the majority's refusal to conduct any meaningful analysis of the Supreme Court's several Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided, its insistence that the plainly distinguishable *Nyquist* case is directly on point, and the factually unsupported antireligious-schools arguments in the opinion strongly suggest that the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools.

I.

It is implicit in the majority's reasoning that there is no need for any independent analysis whether Ohio's voucher program violates the Establishment Clause because *Nyquist* is "on point with the matter at hand." Slip op. at 13. In my judgment, the majority is mistaken as a matter of *fact* (the two statutes are totally different) and as a matter of *law* (the relevant Establishment Clause jurisprudence has changed since *Nyquist*). As to the latter, a reading of the Supreme Court's Establishment Clause cases decided since 1973 makes it unmistakably clear that the voucher program passes constitutional muster. I do not claim that the *Nyquist* decision has been overruled, although some of the reasoning in the *Nyquist* opinion has been "undermined," as the Ohio Supreme Court put it in *Simmons-Harris v. Goff*, 711 N.E.2d 203, 208 (Ohio 1999); *Nyquist* is simply inapposite to the appeal before us.

The New York statutory provisions struck down in *Nyquist* and the Ohio voucher program are essentially different laws; they are plainly distinguishable both in their

declared purposes and in the manner of their application. For that reason alone, the reasoning and the holding of the *Nyquist* decision cannot govern our result.

A.

I begin with a comparison of the New York statutory provisions construed in *Nyquist* and the Ohio statute before us; a comparison that shows very clearly that the two laws are essentially different. I then examine the Supreme Court Establishment Clause cases decided since *Nyquist*, which clearly indicate that the Ohio voucher program is not unconstitutional.

1.

In *Nyquist*, the Supreme Court was required to decide whether a New York statute containing provisions for both direct and indirect financial assistance to New York's private schools violated the Establishment Clause. The statute provided for three forms of assistance: (1) direct grants for building maintenance and repairs for private school buildings; (2) tuition reimbursement grants for some low-income parents of children already attending the private schools; and (3) a form of tax relief for parents who failed to qualify for tuition reimbursement under the statute. *See Nyquist*, 413 U.S. at 762-65.

The New York legislature enacted the statute for the *sole* purpose of directly benefitting New York state's 2,038 financially pressed *private* schools, wherein some 700,000-800,000 students—almost 20% of the state's entire elementary and secondary school population—were being educated. *See id.* at 768. The legislative "findings" in the New York statute declared: (1) it was in the state's interest to provide funding for "maintenance and repair" of the state's

private schools in order to protect the health and safety of those attending the schools; (2) the state had an interest in promoting "alternative educational systems"; and (3) a "precipitous decline" in the number of children attending private schools would perpetuate an already existing fiscal crisis in public schools. *Id.* at 763-65.

The *Nyquist* Court held that the New York law offended the Establishment Clause because "the effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783. Furthermore, the *Nyquist* Court concluded that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780.

The Ohio voucher program, which is adequately described in the majority opinion, could not be more unlike the New York statute both in its purpose and in the manner of its application. The essential differences between the New York and Ohio statutes may be summarized as follows:

First, the purpose of the New York statute was to provide financial help to New York's financially troubled *private schools* because their closing would force New York's public schools to absorb the private school students, resulting in massive increased costs and the related burdens of absorbing as many as three quarters of a million new students.

The purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the *public schools* in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious

private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Second, the New York program involved *direct* financial grants to New York's *private* schools, religious and nonreligious, primarily for maintenance and repair. Although the tuition reimbursement and tax relief sections of the statute appeared to benefit the parents of private school children, the *Nyquist* Court stated that the "tuition reimbursement program also fails the 'effect' test, for much the same reasons that govern its maintenance and repair grants." *Id.*

Under the Ohio voucher program, on the other hand, there is no provision for any financial grants in any form to any private schools. A voucher recipient receives a scholarship check, and the funds therefrom reach a private religious school only after a child's parents have considered a variety of options available to them and have chosen the religious private school as the best option for their child.

Third, the New York statute permitted government aid to schools that discriminated against children on the basis of religion and, in fact, several qualifying schools imposed religious restrictions on admissions. *See id.* at 767-68.

The Ohio voucher program, on the other hand contains a provision explicitly forbidding participating schools from discriminating against prospective students on the basis of religion. *See* Ohio Rev. Code § 3313.976(A)(4).

It is clear that the New York statute struck down in *Nyquist* and the Ohio statute before us are dissimilar laws both in their purposes and the methodologies for carrying out

their purposes. As the majority acknowledges, "[a] single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition." Slip op. at __ (internal quotation marks and citation omitted). A case construing a statute so manifestly different than the one before us could hardly, as a *factual* matter, be a binding precedent on this court.

2.

The substantial differences in the purpose and application of the two statutes is not the only reason *Nyquist* does not govern our result. The additional reason is that the rule of law upon which *Nyquist* was decided has changed. First, the *Nyquist* era categorical prohibition against direct grants to aid religious schools is no longer the law; and second, the criteria for determining when a statute has the forbidden "primary effect" of advancing religion have been modified.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court fashioned the following test for assessing whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or *primary effect* must be one that neither *advances* nor inhibits *religion* ...; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (emphasis added) (internal quotation marks and citation omitted).

The *Nyquist* Court ruled that the New York statute violated the *Lemon* test because it had the "impermissible effect of advancing religion." *Nyquist*, 413 U.S. at 794. It did so, the Court said, by providing direct financial assistance to religious schools without any restrictions as to the schools' use of the funds, therefore "advanc[ing] the religious mission of sectarian schools." *Id.* at 779-80. But three years ago in *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court declared unmistakably that "we have departed from the rule ... that all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. The *Agostini* Court then proceeded to redefine and narrow the criteria for determining when government aid that finds its way to a religious school has the primary effect of advancing religion.

Again, I do not question for a moment the correctness of the Supreme Court's decision in *Nyquist*. I accept it both analytically and precedentially as a faithful 1973 application of the "primary effect" test of *Lemon*. However, *Nyquist* was not analyzed and decided under what the *Agostini* Court called its "changed ... understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. Since this appeal is also an "impermissible effect" case, our decision cannot be controlled by *Nyquist*.

B.

What then is the Supreme Court's "changed ... understanding" of the proper test for determining whether a law has the primary effect of advancing religion?

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court held that a Minnesota statute authorizing a tax deduction for certain educational expenses for parents of students attending either public or private schools, religious or nonreligious, did

not violate the "impermissible effect" prong of the *Lemon* test. The Court focused on the fact that the deduction was given directly to the parents, without regard to the type of school, religious or nonreligious, to which the parents might choose to send their children, as a strong indicator of the statute's "neutrality." *See id.* at 397-400. Any money received at a religious school, the Court said, was "ultimately controlled by the private choices of individual parents." *Id.* at 400.

This principle—that whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice—was reasserted in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). There, a Washington state program survived an Establishment Clause challenge even though it provided vocational rehabilitation assistance for a blind individual to attend a Christian college in order to study to be a Christian pastor. Funds under the program were [disbursed] directly to the eligible applicants who made the choice of where to expend the educational funds; therefore, "[a]ny aid ... that ultimately flow[ed] to religious institutions [did] so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the constitutionality of a program providing a sign-language interpreter for a deaf student in a Catholic high school. Relying upon *Witters* and *Mueller*, the *Zobrest* Court concluded that the statute gave parents the choice of where to send their eligible children to school and "distributes benefits neutrally ... without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school." *Id.* at 10 (quoting *Witters*, 474 U.S. at 487).

This line of cases culminated in the *Agostini* decision in 1997, in which the Supreme Court declared that its understanding of the criteria for determining whether, in any specific program, government aid has the primary effect of advancing religion had "changed." Indeed, in *Agostini* the Supreme Court went so far as to modify the *Lemon* test it had relied upon in *Nyquist*. The *Agostini* Court began by recasting *Lemon*'s "entanglement" inquiry as a factor under the "impermissible effect" prong rather than as a separate and independent criterion. *See Agostini*, 521 U.S. at 232-34. It then identified three new sub-criteria to consider when evaluating whether a government-aid program violates *Lemon*'s "impermissible effect" prong. These are:

> (1) whether the aid results in governmental indoctrination;
>
> (2) whether the aid program defines its recipients by reference to religion; and
>
> (3) whether the aid creates an excessive entanglement between government and religion.

See id. at 234.

Using this modified *Lemon* test, the *Agostini* Court found constitutional a federally mandated New York program that sent public school teachers into private parochial schools to provide remedial education to eligible children. Under the program, children meeting the eligibility requirements received the services, whether they attended a private or public school. *See id.* at 232. The *Agostini* Court concluded that programs in which money ultimately flows to a private, religious school based on the "'genuinely independent and private choices of' individuals" do not violate the

Establishment Clause. *Id.* at 226 (quoting *Witters*, 474 U.S. at 488).

Finally, in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), a plurality opinion written by Justice Thomas, the Court upheld the constitutionality of a federally mandated Louisiana program where educational materials were loaned to public and private schools, both religious and nonreligious. Justice Thomas emphasized that the statute did not have an "impermissible effect" because the "principles of neutrality and private choice, and their relationship to each other [that] were [also] prominent" in the Court's decisions in *Agostini*, *Zobrest*, *Witters*, and *Mueller* were present. *Id.* at 2542.

II.

It is against this background of changed Supreme Court Establishment Clause jurisprudence that we must test the constitutionality of the Ohio voucher program.

The Ohio statute is the product of a 1994 order issued by the United States District Court in Cleveland, directing the Ohio Superintendent of Education to address the educational crisis in Cleveland's public schools. *See Reed v. Rhodes*, 869 F.Supp. 1274 (N.D. Ohio 1994). The Ohio legislature and the state's governor responded with the voucher program that is before us today. *See* Ohio Rev. Code §§ 3313.974-3313.979. We may safely assume that in fashioning the new law, the Ohio legislators and the governor knew that the challenge they faced was to design a law that would survive a federal constitutional challenge on Establishment Clause grounds. That is not to say that the statute the legislators wrote and the governor signed into law is insulated from federal judicial constitutional scrutiny. Rather, it is to say what the majority does not even acknowledge: this statute is *presumed* to be constitutional. *See McDonald v. Board of*

Election Comm'rs, 394 U.S. 802, 809 (1969); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1366 (6th Cir. 1984). This presumption is not a mere literary figure for rote recitation in all appellate opinions addressing the constitutionality of legislative enactments; it is a bedrock rule of statutory construction, one we are bound assiduously to honor as we begin our assessment of the validity of the Ohio statute.

The first of the *Lemon* criteria that must be met if a statute is to survive an Establishment Clause challenge is that it have a "secular purpose." The Ohio voucher program meets this criterion and the plaintiffs agree that it does. The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape. There is also no serious claim that the statute is constitutionally invalid solely because it fosters an "excessive entanglement" between government and religion. Rather, the only issue in the case is whether the voucher program has the forbidden "primary effect" of advancing religion. This court's first duty, therefore, after recognizing that *Nyquist*'s factually and legally outdated decision is of no help, is to proceed to examine the first two criteria from *Agostini*'s "impermissible effect" test to determine whether the effect of Ohio's voucher program is to advance religion, either because (1) the aid it provides results in governmental indoctrination, or (2) the program defines its recipients by reference to religion. *See Agostini*, 521 U.S. at 234. These are the *only* two issues properly before us.

A.

In addressing *Agostini*'s first criterion for testing a statute's claimed impermissible effect, we must ask whether

the government aid in the form of the tuition voucher results in "governmental indoctrination." It is obvious that the Ohio statute does not have the remotest effect of providing governmental indoctrination in any religion, to say nothing of having such a primary effect.

The Supreme Court decisions since *Lemon* and *Nyquist* have emphasized that the critical question in determining whether government aid ultimately flowing to religious schools results in governmental indoctrination is if the recipient beneficiaries make a "genuinely independent and private choice[]" to "spend" the funds in a religious school. *Id.* at 226 (internal quotation marks and citation omitted). If the recipients have such an independent and private choice, then the government's decision to provide the money to fund that choice does not have the effect of advancing religion. The government is, of necessity, neutral in the matter. Implicit in that constitutional rule of law, as it applies in this case, is that there must be a *genuine* choice from among a range of alternatives that indicate complete neutrality on the part of the government as to where the recipient parents may choose to spend the government-aid funds. The voucher program does not offend the Establishment Clause because the statute allows parents to make a *genuine* choice for their children who are currently in Cleveland public schools.

What are the choices Ohio has given these Cleveland parents?

(1) To permit their children to remain in the Cleveland public schools as before;

(2) To accept a tuition voucher for them to attend a Cleveland area nonreligious private school;

(3) To accept a tuition voucher for them to attend a Cleveland area religious private school;

(4) To accept a voucher for them to obtain special tutorial help in the Cleveland schools; or

(5) To accept a voucher for them to attend a public school in a district adjacent to Cleveland, although for the present these districts have declined to participate in the program.

See Ohio Rev. Code §§ 3313.976-3313.978.

It is difficult to imagine a statute that could afford its voucher recipients a broader spectrum of educational choice. It is true, of course, that the public school districts adjacent to Cleveland have declined to participate in the voucher program, but there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate. What we measure today is not whether the children in Cleveland have the fullest conceivable range of options available to them that a panel of federal judges might think to be ideal, but rather, whether the statute, as enacted, has the primary effect of advancing religion by involving the state in governmental indoctrination under *Agostini*'s first criterion. *See Mitchell*, 120 S. Ct. at 2541-44. To my knowledge, no federal court has *ever* held that a school-choice voucher program is unconstitutional because the range of choices does not include a public school option; certainly the majority does not cite such a case.

B.

Neither does the Ohio program "define its recipients by reference to religion," the second *Agostini* factor for testing for "impermissible effect." *Agostini*, 521 U.S. at 234. The program defines the first-priority voucher recipients by reference to (1) their attendance in one of Cleveland's public schools; and (2) a family income that is not more than 200 percent of the federally established poverty level. *See* Ohio Rev. Code § 3313.978(A). And the statute explicitly forbids a religious test for admission to a participating school, including religious schools. *See id.* at § 3313.976(A)(4). A parent has the choice of using the voucher in a private religious school, a private nonreligious school, for tutoring in the public school, or in a public school in a neighboring district if any wish to participate. The statute expresses no preference, explicitly or implicitly, either as to the religion of the voucher recipients, or if the recipient chooses a private school, whether the voucher is applied to a religious or nonreligious school.

The *Agostini* Court recognized, of course, that the eligibility requirements of a government-aid program could "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. The Court noted that a financial incentive to choose a religious school over a nonreligious school is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

Despite the plain evidence that the aid to the parents of the Cleveland school children is indeed "allocated on the basis of neutral, secular criteria that neither favor nor

disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *id.*, the majority continues to insist that the voucher program is not neutral because it creates a forbidden "incentive" for parents in Cleveland to choose a religious school. As best I can understand it, they rest this conclusion—unsupported though it is by any evidence in the record—on two further conclusions. The first is that because the vast majority—82 percent—of the private schools participating in the Ohio program are religious, the people of Cleveland are denied a "genuine" choice. This argument is made despite the indisputable fact that of *all* the private nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason. This not very thinly veiled antipathy the majority has shown toward religious schools—its argument that there are too many religious schools in the program—is meritless for another reason: the Supreme Court has flatly rejected the argument that a high percentage of religious schools participating in a government-aid program is an indicator that the government is engaging in governmental indoctrination of religion. *See Mitchell*, 120 S. Ct. at 2542; *id.* at 2562 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 229; *Mueller*, 463 U.S. at 401.

The majority then attempts to support its view that the Ohio statute creates a forbidden incentive for parents to choose a religious school by utilizing the transparent argument that this statute should be struck down because the religious schools in the program are too religious. In support of this proposition, the majority devotes considerable attention to the mission statements of several religious schools, which indicate the pervasively religious character of their programs. My brothers conclude therefrom that these schools "believe in interweaving religious beliefs with secular subjects" and "incorporate [in their curriculum]

religious concepts, motives, and themes." Slip op. at 5, 27. Imagine, religious schools that are truly religious!

This plainly hostile attack on the religious schools in the Ohio voucher program is one I would [have] thought unworthy of mention in an opinion from this great court. Is the point being made here that religious schools may participate in a voucher program providing they are not too religious? Or, is it that these poverty-level parents in Cleveland cannot be trusted to understand what they will be exposing their children to if they choose on of these religious schools? One would have thought that the nail was long ago driven into the coffin bearing the discredited arguments that if a voucher program involved too many religious schools, or if those involved are honestly, genuinely, and essentially religious, the statute is therefore invalid as "advancing religion." This most unattractive argument was utterly rejected in *Witters*, 474 U.S. at 486-88, and *Mueller*, 463 U.S. at 397-400, and also was rejected in Justice Powell's concurring opinion in *Witters*. *See Witters*, 474 U.S. at 492 (Powell, J., concurring). Moreover, Justice Thomas, writing for a clear majority *on this point* in *Mitchell*, stated:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Mitchell, 120 S. Ct. at 2552.

The majority, in this case, straining mightily to strike down this law, then conjures still another anti-voucher argument (the reader will recall that the majority's decisional

premise is that this case is controlled by *Nyquist* and, implicitly, that all else is irrelevant).

My colleagues' next non-*Nyquist* argument is that the "school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions." Slip op. at 23. This statement in the majority opinion, which, like so many others in the opinion, is totally without any basis in the evidence, is then fortified by my brothers' *ipse dixit* that "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Id.* at 24. The only authority my colleagues offer for this speculation is a Fordham University Law Review article. I can only surmise that the point my colleagues wish to make here is that nonreligious schools will not participate in Ohio's voucher program because the voucher will not cover the cost of educating a student in a nonreligious school. This, my brothers reason, creates an "incentive" for the parents to send their children to the religious schools where they can be educated more efficiently and for fewer dollars.

There is absolutely no evidence in the record to support the majority's argument that the Ohio statute creates a financial "disincentive" for Cleveland's neighboring, suburban public school districts to participate in the program. There is no evidence to support what the majority seems to imply—that some parents wishing to use a voucher choose not to do so because other Cleveland area public schools are not participating. And there is no evidence that if a public school chooses to participate in the voucher program, it will lose its state funding.

These arguments are built on a "factual" predicate that has absolutely no basis in the record. There is not a scintilla of evidence in this case that any school, public or

private, has been discouraged from participating in the school voucher program because it cannot "afford" to do so. The import of this argument, as best I can understand it, is that the parents of the Cleveland school children have an "incentive" to choose Cleveland's religious schools because there are not enough nonreligious schools participating in the program. Of course, there is no evidence of that either. And there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason, including a supposed inability to afford the differential between the value of a $2,500 voucher and the actual cost of a nonreligious, private school education.

While I hesitate to dignify that majority's speculation with speculation of my own, what is at stake in this case is too important to let any of my colleagues' meritless arguments go unanswered.

It is indisputable that no nonreligious, private school, or any other school for that matter, has ever been discouraged from participating in the Cleveland voucher program and there is no evidence that any private school, religious or nonreligious, has ever turned away a voucher applicant for any reason. Therefore, what my colleagues must be getting at is even more insidious and offensive. The point apparently is that Cleveland parents would never choose to send their children to a religious school in Cleveland if they could afford to send them to a nonreligious, private school, or another public school, but that they cannot do so because the cost differential between the value of a $2,500 voucher and the actual tuition of Cleveland's nonreligious, private schools is prohibitive. Again, it is of no small importance that there is absolutely no evidence in the record that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because

there was a differential cost that was prohibitive. It is probably true that no private school, religious or nonreligious, can educate a child for the voucher value of $2,500. But, in all probability, the participating private schools are willing to accept the voucher as meeting a portion of the actual educational costs for these children and are willing to absorb the differential cost as part of their *pro bono* service in Cleveland to help save as many of these children as possible from the disastrous consequences of continuing in the city's failed public schools.

But more important that all of this speculation is the reality that the majority's "neutral only if affordable to all" test is utterly meritless *as a matter of law* because the now settled Establishment Clause jurisprudence is that whether aid is allocated on the basis of neutral, secular criteria is the key determinant of whether, having made the aid available, the state has engaged in governmental indoctrination in religion. *See Agostini*, 521 U.S. at 231.

If the simplicity and clarity of the Supreme Court's language in *Agostini* is not sufficient to demonstrate that the Ohio statute does not in any respect operate to advance religion, confirmatory language of crystal clarity appears in the Supreme Court's recent decision in *Mitchell*. In a passage in his opinion which enjoys the support of a majority of the Justices, and arguably even the support of the dissenters, Justice Thomas states:

> [T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in these schools could reasonably be attributed to governmental action.

Mitchell, 120 S. Ct. at 2541.

The line of cases decided in the Supreme Court beginning with *Mueller* in 1983 and ending with *Mitchell* in 2000 make it unmistakably clear that the majority's "impermissible incentive" argument has no basis in our Establishment Clause jurisprudence. The rule is now settled that a government program that permits financial aid ultimately to reach religious schools does not offend the Establishment Clause if the government's role in the program is neutral. Neutrality exists if the "governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* (quoting *Agostini*, 521 U.S. at 226). Justice Thomas wrote that "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates ... an 'incentive' for parents to choose such an education for their children." *Id.* at 2543-44. Finally, Justice Thomas concluded that the possibility that government aid might be diverted by a sectarian school towards some religious end is irrelevant, for Establishment Clause purposes, if the government aid program provides the aid in a neutral manner. *See id.* at 2547.

In her concurring opinion in *Mitchell*, Justice O'Connor, joined by Justice Bryer, agreed that "neutrality is an important reason for upholding government-aid programs" against Establishment Clause challenges, but she reiterated that it was just one factor to consider in challenges to government school-aid programs and not a "factor [of] singular importance." *Id.* at 2556-57 (O'Connor, J., concurring). Even Justice Souter's dissenting opinion, which Justices Stevens and Ginsburg joined, conceded that the Establishment Clause presents no obstacle to government aid

if it reaches sectarian schools as a result of the private choices of aid recipients. *See id.* at 2584 (Souter, J., dissenting).

Justice O'Connor emphasized the distinction between "true private-choice programs" and "per-capita school-aid programs." *Id.* at 2559 (O'Connor, J., concurring). The Ohio voucher program, like the programs in *Zobrest* and *Witters*, is a true private-choice program because the aid is given directly to eligible individuals, who in turn decide where to spend it. The programs considered in *Mitchell* and *Agostini* were examples of per-capita school-aid programs because aid was distributed based on the number of students attending each school, regardless of whether the school was religiously based or not. Justice O'Connor concluded that true private-choice programs were more likely to survive Establishment Clause challenges, even though government aid was diverted to the religious schools, because "'[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.'" *Id.* at 2558 (quoting *Witters*, 474 U.S. at 488) (O'Connor, J., concurring).

True private-choice programs, by their very nature, cannot have the forbidden "primary effect" of the government "advancing religion" because the aid is given directly to the beneficiary and that student or parent retains control over where the aid will be applied. "The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision." *Id.* at 2559. Furthermore, when government aid flows to a religious school as a result of "independent decisions made by numerous individuals ..., [n]o reasonable observer is likely to draw from the facts ... an inference that the State itself is endorsing a religious

practice or belief." *Id.* (internal quotation marks and citation omitted).

The majority opinion in this case claims the voucher program "involves the grant of state aid directly and predominantly to the coffers of the private, religious schools." Slip op. at 27. Furthermore, according to the majority, "[t]here is no neutral aid when that aid principally flows to religious institutions...." *Id.* at 27. The majority ignores that this view has been flat-out rejected by the Supreme Court in the decisions I have discussed which make it very clear that the *number* of religious schools participating in the voucher program, the thoroughness of the religious training that occurs there, and the use to which such schools might put the funds are all totally irrelevant to the question of the government's neutrality, when the government aid reaches a religious school only as a result of the recipient's "'genuinely independent and private choice[].'" *See Mitchell*, 120 S. Ct. at 2541 (citation omitted); *Zobrest*, 509 U.S. at 8; *Witters*, 474 U.S. at 486. By ignoring the recent Supreme Court cases emphasizing the importance of genuinely independent and private choices and the distinction between true private-choice programs and per-capita school-aid programs, the majority has failed to conduct a "meaningful" independent analysis of the voucher program's constitutionality.

III.

In summary, and to repeat, according to the Supreme Court, a true private-choice program does not result in "governmental indoctrination" so long as the path of the government aid is determined by the "'genuinely independent and private choice[]'" of the aid recipients. *See Mitchell*, 120 S. Ct. at 2541 (citation omitted); *id.* at 2557-60 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 226; *Zobrest*, 509 U.S.

at 10, 12; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at. 397-98, 400.

Ohio's voucher program easily meets this test. Before a voucher is "spent" at a religious school, Cleveland parents must independently make two important choices:

First, they must decide whether their child will take advantage of the voucher alternatives at all, or select another option, such as remaining in the Cleveland schools, undertaking home schooling, or attending one of Cleveland's well regarded community schools. Second, if a child's parents choose the voucher option, they must make the further "genuinely independent and private choice[]" whether to use the voucher at a private school, nonreligious or religious, or for special tutoring in the Cleveland public schools. The voucher-use choice of attending a public school in a neighboring district is not presently available to Cleveland parents because no neighboring district has opted into the voucher program.

It is difficult to image how a voucher statute could be crafted that more clearly and decisively forecloses the government from having any role in the religious indoctrination of Cleveland school children, or forecloses it from defining the recipients of the vouchers by reference to religion, than through the range of free and independent choices the statute gives to the parents whose children attend the Cleveland public schools.

IV.

In striking down this statute today, the majority perpetuates the long history of lower federal court hostility to educational choice. It does so by reaching back to a 1973 Supreme Court decision, *Nyquist*, that construes a statute that

is light years away from the voucher program before us and that rests upon law that has been altered in an important respect by subsequent Supreme Court decisions. My colleagues refuse to acknowledge that the program in *Nyquist* is factually distinguishable in essential ways from the Ohio voucher program and that the Supreme Court has explicitly declared that the criteria for determining whether a statute authorizing government aid to schools violates the Establishment Clause have changed. And then, almost as if recognizing that its *Nyquist*-is-directly-on-point argument cannot withstand close scrutiny, the majority resorts to the lamentable tactic of attempting to arouse support for its view by making the familiar but unworthy arguments that the voucher program has too many religious schools and that they are too religious. This argument should fail, first, because it is rooted in nativist hostility toward religious schools and, second, because it has been explicitly rejected by the Supreme Court as a legitimate determinant of whether a government is engaging in religious indoctrination.

Despite the majority's disclaimer that "courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another," slip op. at 9, the majority opinion is nothing more than an attack upon the philosophical and cultural desirability of publicly funded educational choice for the poor. This case and its result—sentencing nearly 4,000 poverty-level, mostly minority, children in Cleveland to return to the indisputably failed Cleveland public schools from which, in many cases, they escaped as long as three years ago—is an exercise in raw judicial power having no basis in the First Amendment or in the Supreme Court's Establishment Clause jurisprudence.

In all events, a matter of this gravity and of such immense importance to the Cleveland children who are

directly affected, and indeed to the nation, should not be determined by just two judges of this court. Therefore, I respectfully urge my colleagues to take this case for *en banc* review, if they are asked to do so, and decide the vitally important Establishment Clause issue it presents, after giving careful consideration to the full panoply of Supreme Court Establishment Clause jurisprudence, and not just one, inapposite 1973 case.

As to what is written in part IV of the majority opinion, I have no disagreement.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, *et al.*,	)	Case No.: 1:99CV1740
Plaintiffs	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO,	)	
Defendant	)	
SUE GATTON, *et al.*,	)	Case No.: 1:99CV1818
Plaintiffs	)	
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, *et al.*,	)	[Filed: December 20, 1999]
Defendants	)	*JUDGMENT ENTRY*

The court, having granted Plaintiffs' motions for summary judgment in a separate order of this same date and having denied Defendants' motions for summary judgment, now enters judgment for Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* and against Defendants Susan Tave Zelman, *et al.*, Intervening Defendants Senel Taylor, *et al.* and Intervening Defendants Hanna Perkins School, *et al.*

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, *et al.*,	) Case No. 1:99CV1740
Plaintiffs	) JUDGE SOLOMON OLIVER, JR.
v.	
DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO	
Defendant	
SUE GATTON, *et al.*,	) Case No. 1:99CV1818
Plaintiffs	
v.	
DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, *et al.*,	) [Filed: Dec. 20, 1999]
Defendants	) ORDER

I. INTRODUCTION AND FACTS

Plaintiffs brought this action seeking to enjoin permanently a portion of the Ohio Pilot Scholarship Program

on the ground that it violates the Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the U.S. Constitution. All plaintiffs and all defendants in these consolidated actions have filed motions for summary judgment except for Intervenor/Defendant Hanna Perkins, who filed a brief in support of the other Defendants' motions for summary judgment. For the reasons set forth below, the court grants the Motions for Summary Judgment of Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* (Doc. Nos. 83 and 97, respectively), and denies the Motions for Summary Judgment of Intervening Defendants Senel Taylor, *et al.* and the State Defendants, *et al.* (Doc. Nos. 82 and 92, respectively). Accordingly, the State Defendants are permanently enjoined from administering the Voucher Program.

In 1995 the Ohio Legislature enacted a pilot scholarship program to address an educational crisis in Cleveland's public schools in the wake of a U.S. District Court-ordered takeover of the administration of the Cleveland City School District (the "District") by the State. This program, as more fully discussed herein, was struck down by the Ohio Supreme Court as being in violation of the Ohio Constitution. The program was re-enacted in all pertinent respects by the Ohio Legislature in June 1999. The 1999 program is applicable, as was the 1995 program, to students residing in the District. The program has two components: a scholarship program to enable students to attend "alternative schools" ("Voucher Program" or "Program"); and a tutorial program for children attending the Cleveland Public Schools ("Tutorial Program"). Plaintiffs, while challenging the constitutionality of the Voucher

Program, do not challenge the Tutorial Program in this action.[1]

Private schools within the geographic boundaries of the District and public schools adjacent to the District are eligible to participate in the Voucher Program as "alternative schools." In order to do so, private schools must register with the State Superintendent. Recipients are chosen by lot an receive a fixed percentage of the tuition charged by the alternative school of their choice, up to $2,500. Students whose family income is not more that 200% of the federally-established poverty level receive 90% of their school tuition; other scholarship recipients whose family income is above this threshold receive 75% of their tuition. Participating students may first enroll in the Program as early as when they enter kindergarten and must do so by third grade. Once admitted to the Program, they are eligible for scholarships through eighth grade. Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipient; thereafter, the parents must endorse the check to the school. The State places no restriction on how the private school may utilize the money. In the event that an adjacent public school is involved, the State would issue a check made payable to the school district.

In the three years prior to the Ohio Supreme Court's holding the 1995 program unconstitutional, no public schools registered for the program. None have registered since the enactment of the Program in 1999. For the 1999-2000 school

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[1] Tutorial grants may be used to obtain tutorial services for students enrolled in the Cleveland Public Schools. The same number of scholarships and tutorial grants must be awarded in a given year. The eligibility criteria for tutorial grants are the same as those for the scholarship grants, discussed below. The maximum allowable tutorial grant is $500.

year, 3,761 students were to be enrolled in the Program. Sixty percent of these students are from families at or below the poverty level. At the beginning of the 1999-2000 school year, fifty-six schools were registered to participate in the Program. Forty-six of the schools, or over 82%, are church-affiliated.[2] Of the 3,761 students enrolled in the Program, 3,632, or over 96%, are enrolled in sectarian schools. Pl. J.A. vol. I, Ex. E.

Religious characteristics vary from school to school, but participating schools share certain traits. For example, it can generally be said that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience. A review of several schools' parent handbooks perhaps provides better insight into the religious nature of the schools at issue.[3]

For example, Saint Patrick School includes in its Family handbook the following:

PHILOSOPHY OF CATHOLIC EDUCATION

> We believe that a philosophy of Catholic education begins with faith that God, in

[2] The number of participating schools and number of participating religious schools were reached by Plaintiffs as a result of obtaining discovery from the State and the Hanna Perkins Intervenors/Defendants. O'Brien Aff. at ¶6, Pl. J.A. vol. I. Defendants do not dispute Plaintiffs' figures.

[3] The parties have stipulated that the handbooks and mission statements produced by the schools participating in the Voucher Program "are authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or misleading." Stipulation by the parties of October 15, 1999, at 2.

> creating, gifted us with life. He became one of us in His Son Jesus, and in the person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with the community He formed, witnessing and sharing the Good News in every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective that the educational ministry of the Catholic community flows.

* * *

MISSION STATEMENT

St. Patrick School is a Catholic School in the Diocese of Cleveland, Ohio. The mission of St. Patrick School is to live and teach the Gospel message. We are dedicated to the formation of youth according to our Catholic Traditions within an innovative academic environment which provides students with the opportunity to develop spiritually, academically, and socially to the best of their abilities.

Objectives of Education

1. To communicate the gospel message of Jesus.
2. To provide opportunities to build and experience a faith community.
3. To orient students to the responsibility and experience of service because of their membership in the Christian community.

4. To provide students with opportunity for growth in prayer.
5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.
6. To develop a faculty and staff who by their presence and teaching express an integrated approach to learning and living in their lives.
7. To provide an academic program and environment conducive to the optimal development of each student.

St. Patrick Handbook at 1, Pl. J.A. vol. III, Ex. I, Tab 26.[4] Additionally, all students are required to participate in religion classes, which are taught daily, and to attend all religious, liturgical, and paraliturgical celebrations. *Id.* at 10.

At St. Rocco School, "[a]n integral part of the school program is instruction in religious truths and values. These values permeates [*sic*] the whole atmosphere of the school." St. Rocco School Handbook at 3, Pl. J.A. vol. III, Ex. I, Tab 27. Each student at St. Rocco School is expected to contribute a nominal amount for membership in the Society for the Propagation of the Faith. *Id.* at 11. Like St. Patrick School, "[a]ll students, whether Catholic or not, participates [*sic*] in religion classes, mass, religious activities, and receive a religion grade." *Id.* at 11. Parents are asked to help their children practice specific prayers at each grade level. For example, they are to teach their children the Sign of the Cross

[4] These are the "goals for Catholic schools in the Diocese of Cleveland." Pl. J.A. vol. IV, Ex. J, Tab 2 at *v.* Thirty-four of the forty-six participating religious schools are affiliated with the Diocese. Pl. J.A. vol. I, Ex. B, Tab 3.

and the Hail Mary in kindergarten and the Our Father and Glory Be to the Father in first grade. *Id.*

St. Stanislaus School "is an integral part of the St. Stanislaus community whose shared mission with parents is to facilitate Christian values within the context of the core curriculum. [They] commit [them]selves to the formation of a faith-filled Catholic community, preparing students for spiritual development, and future roles as responsible, knowledgeable, productive Christian individuals." St. Stanislaus School Materials, Pl. J.A. vol. III, Ex. I, Tab 28. As one of its goals, "St. Stanislaus School will increase their Catholic Identity by developing opportunities for faith development of faculty and students." *Id.* As at St. Patrick and St. Rocco Schools, religion classes are taught daily at all grade levels and "[n]on-Catholic students attending [the school] are expected to be a part of the religion program and activities throughout the year." *Id.* Likewise, students and their families "are expected and obligated to attend and participate in the week-end liturgy." *Id.*

The philosophy of education at St. John Nottingham Lutheran School is:

> It is our belief that the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier, whose love for us moves us to show in our every act, thought, word and desire, our love for Him.
>
> "The Fear of the Lord is the Beginning of Knowledge." Proverbs 1:7.

St. John Nottingham Handbook at 2, Pl. J.A. vol. III Ex. I, Tab 34. Religion is taught at St. John Nottingham Lutheran

through weekly worship chapel services, Bible studies, catechism, church history, confirmation instruction and memory. Additionally, the school teaches reading, mathematics, spelling, language, social studies, science and handwriting *"with a Christ-centered approach."* *Id.* at 14 (emphasis in original).

> At St. Mark Lutheran School:
>
> The primary focus ... is on our Lord and Savior, Jesus Christ. In all of our goals, Jesus Christ must be preeminent. Because of our commitment to that focus and to our beliefs and philosophy, it is highly inconsistent for any parents to send a child to this school if they:
>
> - Are not a Christian and/or are not interested in learning about Jesus Christ
> - Are not living a Christian life or willing to learn how to lead such a life
> - Are not a supporting part of a Christian congregation through worship and sharing of time and talents

St. Mark Handbook at 2, Pl. J.A. vol. III, Ex. I, Tab 35. All students at St. Mark are required to participate in daily religion classes and to "be instructed in the basic teachings of God's Word through an organized program of Christian education." *Id.* at 28. Each day begins with a classroom devotion and prayer and the school day is ended with

classroom prayer. *Id.* Children also attend weekly chapel services.[5] *Id.*

II. PROCEDURAL HISTORY

Case No. 1:99 CV 1740 was filed on July 20, 1999, by Plaintiffs Doris Simmons-Harris, the parent of a minor child enrolled in the Cleveland City School District for the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvador Church in Lorain, Ohio, against Defendant Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education.

Case No: 1:99 CV 1818 was filed on July 29, 1999, by Plaintiffs Sue Gatton, Chairperson of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glenn Altschuld, Ohio taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education; the State of Ohio through its General Assembly, Governor and other agents; and Sandra Berry, in

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[5] By reciting only those portions of parent handbooks relating to religion, the court does not mean to diminish the importance of the instruction that each school participating in the Voucher Program offers in core subjects such as math, reading, science and social studies. Given the context within which this case is presented, however, the relevant question is not whether or how well these schools educate students in secular subjects, but whether the aid received through the Voucher Program violates the Establishment Clause. Accordingly, a review of the way in which religion is incorporated into the educational philosophy of participating schools is important to this court's analysis of the Voucher Program.

her official capacity as Program Administrator for the Ohio Pilot Scholarship Program.

Two groups have intervened as defendants in both cases. The first group consists of parents and students who have been enrolled, or seek to enroll, in private schools under the Program. That group includes Senel Taylor, parent of a ten-year old child who has attended private school under the Program for the last two years; Johnnietta McGrady, parent of two children who seek to attend a private school under the Program; Christine Suma, parent of three children who have attended private school under the Program and one child who, at the time this action was filed, was on a waiting list to attend private school under the Program; Arkela Winston, parent of two children who have attended private school under the Program; and Amy Hudock, parent of a child who has attended private school under the Program for the past three school years.

The second group of Intervenors includes nonpublic schools and parents of students who wish to participate in the Program. That group includes Hanna Perkins School, Our Lady of Peace School, Westpark Lutheran School, Lutheran Memorial Association of Cleveland, Ivy Chambers, Carol Lambert, and Delories Jones.

As is the case in the instant matter, Doris Simmons-Harris and Sue Gatton were the lead plaintiffs in the state court litigation challenging the 1995 program. The Plaintiffs challenged the 1995 program as a violation of the Establishment Clause of the First Amendment, and under several provisions of the Ohio Constitution.

The state trial court consolidated the two cases before it. On cross-motions for summary judgment, the court concluded that the 1995 program violated neither the United

States Constitution nor the Ohio Constitution. The Plaintiffs then appealed the trial court's decision. In concluding that the 1995 program violated the Establishment Clause as well as one provision of the Ohio Constitution, the appeals court reversed the trial court's decision. Thereafter, the Defendants appealed that decision to the Ohio Supreme Court.

The 1995 program was struck down by the Ohio Supreme Court in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The court held that the program was enacted in violation of Section 15(D), Article II, of the Ohio Constitution in "that creation of a substantive program in a general appropriations bill violates the one-subject rule" found in that provision. *Id.* at 216. The Ohio Supreme Court also addressed the federal constitutional issue raised in that case, whether the pilot program violated the Establishment Clause of the First Amendment. It concluded, contrary to the holding of the Ohio Court of Appeals, that it did not.

The Voucher Program was enacted by the Ohio Legislature on June 29, 1999, as part of the Education Budget Bill. *See* Ohio Rev. Code § 3313.974-3313.979 (Anderson 1999). It is, in all respects pertinent to this litigation, the same as the original pilot scholarship program enacted by the Legislature in 1995, which was operative for three successive school years. As detailed above, the first challenge to the 1999 Program, case no. 1:99 CV 1740 was filed on July 20, 1999, and the second challenge, case no. 1:99 CV 1818, was filed on July 29, 1999.

On August 13, 1999, a preliminary injunction hearing was conducted in which the court entertained oral argument from counsel representing Plaintiffs in both cases, the State, and both groups of Intervening Defendants. After considering the submissions on behalf of all the parties and

the arguments of counsel, this court issued its twenty-eight page order on August 24, 1999, granting Plaintiffs' Motion for a Preliminary Injunction.

On August 27, 1999, the court granted a limited stay of its order enjoining the Program. The stay was made applicable only to those students who were enrolled in the 1995 program during the previous academic year and was granted only for one semester or until the court rendered a final decision on permanent injunctive relief, whichever first occurred. In light of the limited stay, the court set an expedited discovery and trial schedule.

The court conducted telephone conferences with counsel for all parties on September 3 and 17, 1999, in order to make changes as needed to the discovery and trial schedules set by the court in its August 27, 1999 order. As a result of those conferences, the following discovery schedule was established. On September 10, 1999, counsel for all parties were to exchange proposed factual stipulations and requests for documents. Prior to September 17, 1999, counsel for all parties were ordered to attempt to agree upon the factual record which would serve as a basis for the consideration of any summary judgment motions to be filed. In the event that counsel were unable to agree upon a factual record, they had until September 22, 1999, to serve formal discovery requests and notices of deposition. Written discovery responses were due October 8, 1999. All remaining discovery was to be concluded by October 29, 1999. The schedule for the briefing of dispositive motions was set as follows: (a) the dispositive motion deadline was November 1, 1999; (b) responses were due November 15, 1999; and (c) replies were due November 23, 1999. As in the court's August 27, 1999 order, trial was scheduled for December 13, 1999, at 9:00 a.m.

On August 24, 1999, the State appealed this court's order granting Plaintiffs' Motion for Preliminary Injunction to the Sixth Circuit Court of Appeals. Both Intervening Defendants also filed notices of appeal. All Defendants requested a stay of this court's preliminary injunction pending appeal. After this court's August 27, 1999 order granting a limited stay of its preliminary injunction, all Defendants filed revised briefs with the Sixth Circuit, appealing the preliminary injunction with regard to students who were new to the Voucher Program.

While the aforementioned motions were pending before the Sixth Circuit, the State filed a motion for a stay of the preliminary injunction with the United States Supreme Court. On November 5, 1999, by a vote of 5-4, the Supreme Court granted the State's motion. The complete text of that order read:

> Treating the application as a request for a stay of the preliminary injunction, the application for stay presented to Justice Stevens and by him referred to the Court is granted. The preliminary injunction entered by the United States District Court for the Northern District of Ohio, case No. 99 CV 1740, on August 24, 1999, is stayed pending final disposition of the appeal by the Untied States Court of Appeals for the Sixth Circuit.

Zelman, Superintendent of Pub. Instruction, et al. v. Simmons-Harris, Doris, et al., No. 99A320 (U.S. Nov. 5, 1999).

On November 15, 1999, the Sixth Circuit entered an order, wherein it concluded that the Supreme Court's decision granting the State's motion for a stay rendered moot

the Defendants' motions for stay pending in that Court. In light of the expedited schedule set by this court, the Sixth Circuit placed all appeals in this matter in abeyance pending this court's final determination of the case.

III. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific

> facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252, 106 S.Ct. at 2512.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th

Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more that a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

IV. THE ESTABLISHMENT CLAUSE

A. *History*

In promulgating the First Amendment, the framers of the Bill of Rights sought to protect the colonists' right to be free from government inculcation of the theologies and doctrines of a faith to which they did not subscribe. James Madison, one of the authors of the First Amendment, feared that without such protection, the risk of governmental oppression intensified: "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents." James Madison to Thomas Jefferson, October 17, 1788, *reprinted in The Essential Bill of Rights* 326 (Gordon Lloyd et al. eds., University Press of America 1998) (emphasis in original). To Madison, the freedom to believe and practice the religion of one's choice was a fundamental right and was central to a bill of rights.

In his famous Memorial and Remonstrance in which he urged the State of Virginia to reject legislation which

would financially support the propagation of Christianity as the state religion, Madison voiced his opinion on the proper relationship between government and religion: "[A] Government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any sect, nor suffering any Sect to invade those of another." James Madison's Memorial and Remonstrance, June 20, 1785, *reprinted in The Essential Bill of Rights, supra*, at 228. The basis for his belief that the two should remain separate was his fear of what would happen to citizens if the government were to use laws to regulate their beliefs:

> The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. at 226.

Thomas Jefferson's convictions and concerns mirrored those of Madison. In his Statute of Religious

Liberty, he spoke out against the dangers of requiring citizens to support a faith which was not their own: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness...." Jefferson's Statute of Religious Liberty, *reprinted in The Essential Bill of Rights, supra*, at 231.

Madison's and Jefferson's fears and concerns are reflective of those which resulted in the passage of the Establishment Clause—the first clause of the First Amendment of the U.S. Constitution. Its words are simple enough: "Congress shall make no law respecting an establishment of religion...." Since its inception, though, the Establishment Clause has presented some of the most difficult questions of interpretation and application faced by the courts. As the Supreme Court has stated, "in many of these decisions 'we have expressly or implicitly acknowledged that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'" *Mueller v. Allen*, 463 U.S. 388, 393, 103 S.Ct. 3062, 3065-66 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111 (1971)).

While Madison and Jefferson may have espoused a belief in a firm wall between church and state, "a hermetic separation of the two is an impossibility [the Court] has never required." *Roemer, III v. Board of Pub. Works of Maryland*, 426 U.S. 736, 746, 96 S.Ct. 2337, 2344 (1976). The Supreme Court has "recognize[d] that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to

the secular without providing direct aid to the sectarian." *Community for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775, 93 S.Ct. 2955, 2967 (1973). It is now clearly established that not every law which confers a benefit on a religious institution violates the Constitution. Some which confer only "indirect," "remote" or "incidental benefits" have been found to be constitutional. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504 (1947). While line drawing has been difficult in actual cases, a brief examination of some of the Supreme Court's Establishment Clause decisions provides a useful background for assessing the constitutionality of the Voucher Program.

The court has approved tax deductions for the costs of bus transportation by students, regardless of whether they attended public or private school, including parochial schools. *Id.* it also has approved the provision of textbooks at parochial schools when textbooks were not provided to students on the basis of whether they attended public or private school. *Board of Educ. v. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968). Until recently, the Court held that public employees could not provide instruction in secular subjects, such as giving remedial and accelerated instruction on the premises of religious institutions. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); *School Dist. Of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); *Meek v. Pittinger*, 421 U.S. 349, 95 S.Ct. 1753 (1975). However, the Court reversed itself on this issue in *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997).

The Court has generally held that a government cannot provide scholarship assistance to students which supports religious instruction or indoctrination. *Nyquist*, 413

U.S. 756, 93 S.Ct. 2955. However, it has approved of scholarship assistance where the aid to students is provided as part of a program made generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools to be benefited. In such circumstances, aid ultimately supports the educational program of a religious institution only as the result of the private choice of the aid recipient. Consequently, there is no religious indoctrination attributable to the government. The Court has also found that the eligibility criteria under this type of program are not such as to influence the recipient's choice of whether to attend a sectarian or nonsectarian institution. *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 106 S.Ct. 748 (1986); *Agostini*, 521 U.S. 203, 117 S.Ct. 1997.

B. *The Applicable Standard in Establishment Clause Cases*

Before reaching the merits of the parties' respective claims, it is necessary to identify the standard under which these claims are properly analyzed. The applicable test used to analyze Establishment Clause challenges is grounded in the principles set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2125 (1971). In *Lemon*, the Supreme Court established the following three-part test:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion.

Id. at 612-13, 91 S.Ct. at 2111 (citations omitted). If the challenged legislation fails to meet any part of this test, it violates the Establishment Clause. While the *Lemon* test is generally accepted as the cornerstone of Establishment

Clause analysis, limits on its effectiveness in analyzing the myriad of factual scenarios that arise in this area of the law have been recognized. *See Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 2873 (1973) (reasoning that the *Lemon* test provides "no more than [a] helpful signpost" in analyzing Establishment Clause challenges.) Despite its perceived limitations, the Supreme Court has consistently applied this test in Establishment Clause challenges. *See Mueller*, 403 U.S. at 394, 103 S.Ct. at 3066; *Witters*, 474 U.S. at 485, 106 S.Ct. at 748.

Indeed, in *Agostini*, 521 U.S. 203, 117 S.Ct. 1997, the Supreme Court recently reaffirmed the importance of the *Lemon* test in Establishment Clause cases. It confirmed the need to ascertain whether a law has a secular purpose and whether it has the effect of advancing religion, but altered the test's analytical structure by concluding that the "entanglement" prong should be considered as an aspect of the "effects" inquiry.

In collapsing the *Lemon* test from a three-prong to a two-prong inquiry, the *Agostini* Court also divided the second prong of the *Lemon* test into three specific sub-parts. According to *Agostini*, challenged governmental aid passes constitutional muster if it does not: "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234, 117 S.Ct. at 2016. As discussed *infra*, in clarifying the "effects" prong of the *Lemon* test, the Court did not substantially alter the analysis to be applied in Establishment Clause challenges to programs in which the government provides funding that directly aids the educational function of religious schools. The analysis in those cases under the first and second prongs of the test is still grounded in the principles set forth in *Lemon* and in cases applying the *Lemon* test.

Plaintiffs contend that the Voucher Program is unconstitutional under *Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, because it is factually indistinguishable form the tuition reimbursement program struck down in that case. They argue that the Voucher Program has the impermissible effect of advancing religion, as did the program at issue in *Nyquist*.[6] Defendants, on the other hand, argue that the Voucher Program is factually dissimilar from the program at issue in *Nyquist* and that this case should be governed by more recent Supreme Court cases in which the Court has found programs challenged under the Establishment Clause to be constitutional. In Section V, the court will review *Nyquist* and assess whether that case serves as precedent for this one and if so, whether the Voucher Program violates the Establishment Clause, as did the program in *Nyquist*. In Section VI, it will address Defendants' arguments that cases subsequent to *Nyquist* suggest there are meaningful distinctions between that case and this one.

V. THE VOUCHER PROGRAM UNDER *NYQUIST*

A. *Nyquist*

In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973), the Supreme Court found unconstitutional a New York State program intended to provide assistance, in several different forms, to nonpublic elementary and secondary schools. *Id.* The program contained three sections, only the second of which is directly relevant to the instant case. The first established direct money grants form the State to nonpublic, nonprofit elementary or secondary schools serving a high concentration of pupils from low-income families and was to be used for

[6] At the outset, it is important to note that Plaintiffs do not challenge the secular purpose of the Voucher Program.

the maintenance and repair of school facilities. *Id.* at 762, 93 S.Ct. at 2960. The second section was a tuition grant program, which provided for partial tuition reimbursements to low-income parents whose children attended elementary or secondary nonpublic schools. *Id.* at 764, 93 S.Ct. at 2961. The last section gave some limited state income tax relief to parents who did not qualify for reimbursement grants. *Id.*

The tuition reimbursement program in *Nyquist* applied to parents of children who attended all private schools, not just private, sectarian schools. The reimbursement grants were limited to $50 for each grade school child and $100 for each high school child. *Id.* Only parents with an annual taxable income of less than $5,000 qualified for reimbursement. *Id.* In order to receive payment, a parent was required to submit a verified statement to the Commissioner of Education containing a receipted tuition bill. Reimbursements by the State could not exceed 50% of the tuition paid by the parents. *Id.*

Nearly 20% of New York State's elementary and secondary population attended over 2, 000 nonpublic schools, and approximately 85% of these schools were church-affiliated.[7] *Id.* at 768, 93 S.Ct. at 2963. While no detailed factual record was developed in the underlying cases, the *Nyquist* Court noted that several pertinent generalizations could be made about the benefited schools. The qualifying institutions could incorporate a number of religious characteristics, including:

[7] It appears that the religious nature of a school was in part ascertained by reviewing New York State Education Department records and determining whether such records identified a given school as church-affiliated. *See Nyquist*, 413 U.S. at 768 n.23, 93 S.Ct. at 2963 n.23.

> (a) impos[ition of] religious restrictions on admissions; (b) requir[ing] attendance of pupils at religious activites; (c) requir[ing] obedience by students to the doctrines and dogmas of a particular faith; (d) requir[ing] pupils to attend instruction in the theology or doctrine of a particular faith; (e) [that the school is an] integral part of the religious mission of the church sponsoring it; (f) [that the school] ha[s] a substantial purpose the inculcation of religious values; (g) impos[ition of] religious restrictions on faculty appointments; and (h) impos[tion of] religious restrictions on what or how the faculty may teach.

Id. at 768, 93 S.Ct. at 2963 (quoting *Committee for Pub. Educ. And Religious Liberty v. Nyquist*, 350 F. Supp. 655, 663 (S.D.N.Y. 1972)). However, the Court made clear that "the characteristics of individual schools [could] vary widely from [this] profile." *Id.*

Applying the *Lemon* test, the Court first found that the tuition grant program easily passed the secular purpose test. The articulated purposes of the program were to promote pluralism and diversity among New York's public and nonpublic schools and to alleviate the concern that the State's overburdened public school system would suffer significant harm if a large portion of children who had been attending nonpublic schools decided to return to the public schools.

Under the "effects" prong of the *Lemon* test, the Supreme Court found the tuition reimbursement program, "designed to allow direct, unrestricted grants of $50 to $100 per child ... as reimbursement to parents in low-income

brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation," violated the Establishment Clause of the First Amendment. *Id.* at 780, 93 S.Ct. at 2969. There was no doubt, held the Supreme Court, that such grants "could not, consistently with the Establishment Clause, be given directly to sectarian schools...." *Id.* The defendants argued that the program should be saved because the aid was delivered to the parents and was not given directly to the benefited schools. *Id.* at 781, 93 S.Ct. at 2969. As support, they maintained that New York's tuition reimbursement program was similar to programs upheld by the Court in *Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504 (1947), and *Board of Educ. V. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968). In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools. The *Allen* Court upheld the furnishing of text books for children who attended parochial schools. In both cases, grants went directly to parents, and not to schools.

The *Nyquist* Court rejected the notion that the tuition deduction program was consistent with the Establishment Clause simply because aid went to the parents and not directly to the schools. As the Court explained, whether aid goes through parents or is given directly to schools is only one of many factors to be considered in determining whether or not a given program is unconstitutional. To clarify, the Court detailed the reasons why the programs upheld in *Everson* and *Allen* were significantly different from the nature of the tuition grants involved in *Nyquist:*

> In *Everson*, the Court found the bus fare program analogues to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in

> common to all citizens, are 'so separate and so indisputably marked off from the religious function,' that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses.

Id. at 781-82, 93 S.Ct. at 2970 (citations omitted).

Contrary to the grants at issue in *Everson* and *Allen*, the tuition grants in *Nyquist* were not restricted to supporting only secular aspects of a school's educational program. *Id.* at 783, 93 S.Ct. at 2971. There was no attempt to separate secular from religious educational functions and to ensure that the monies provided by the State supported only the former. Concluding that the program had the impermissible effect of advancing religion, the Court stated:

> Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is

> unmistakably to provide desired financial support for nonpublic, sectarian institutions.

Id.

Because the Court found that the tuition grant program at issue in *Nyquist* had the primary effect of advancing religion, it did not address the third prong of the *Lemon* test, whether the program fostered excessive entanglement between church and state.

Before analyzing the Voucher Program under *Nyquist*, it is important to note that the *Nyquist* Court found it significant that:

> [b]ecause of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill' impermissibly advances religion in violation of the Establishment Clause.

Id. at 782 n.38, 93 S.Ct. at 2970 n.38 (citations omitted). This language has been often-quoted in post-*Nyquist* Establishment Clause cases in which the Court has concluded that the challenged programs were constitutional. As discussed below, Defendants argue that this case should be

governed by these post-*Nyquist* cases because the Voucher Program is the type of program contemplated by the Court in footnote 38.

B. *The Voucher Program*

1. The Purpose of the Program

As in *Nyquist*, there is no question that the Voucher Program passes the secular purpose of the *Lemon* test. Indeed, as previously noted, Plaintiffs do not challenge the secular purpose of the legislation. Similar to *Nyquist*, the Program seeks to provide nonpublic school alternatives primarily to low-income students for acceptable reasons. Nevertheless, "the propriety of a legislature's purposes may not immunize from further scrutiny a law which . . . has the primary effect that advances religion." *Id.* at 774, 93 S.Ct. at 2966. Thus, the next inquiry is whether the Voucher Program has the effect of advancing religion.

2. The Effect of the Program

The Voucher Program is clearly similar to the tuition reimbursement program in *Nyquist* in two respects. First, while both public and private schools are eligible, only private schools have chosen to participate in the Program, and the vast majority of them are parochial. Like *Nyquist*, where 85% of the benefitted schools were parochial, over 82% of the schools participating in the Voucher Program are religiously affiliated. Thus, as in *Nyquist*, the "bulk of" the aid under the Voucher Program flows to schools which are "sectarian in orientation." *Id.* at 780, 93 S.Ct. at 2969. Second, as in *Nyquist*, the Voucher Program provides unrestricted tuition grants to parents whose children are eligible for the Program and who attend qualifying schools. Like the program in *Nyquist*, there "'has been no endeavor to

guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.'" *Id.* at 783, 93 S.Ct. 2971-72 (quoting *Lemon*, 403 U.S. at 613, 93 S.Ct. at 2111).

Defendants however, argue that the programs are dissimilar in several ways which would require that the Voucher Program be upheld whereas the *Nyquist* program was struck down. First, the Intervening Defendants argue that even if the large majority of schools participating in the Voucher Program is sectarian, the Program is constitutional because the primary focus of the schools is secular education. They maintain that Voucher schools actually educate their students better than do public schools, asserting that "[i]f ... Scholarship children receive a superior secular education and become better citizens because of their parent's school choice, the primary effect of the Program is secular rather than religious."[8] Def. Hanna Perkins Motion at 4-12.[9]

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[8] Along the same lines, the State spends nearly one-third of its brief explaining how the primary effect of the Voucher Program is to provide experimental data on whether the availability of such a program will improve educational opportunities for disadvantaged students. According to the State, if a private school adequately teaches core secular subjects, "then the mere fact that ... [the] school also teaches religion to its students cannot mean that the private school now suddenly serves the State's secular goals less well than if it did not add religion to its teaching." Def. State Motion at 30.

[9] As cited herein, the various briefs in support of the parties' respective positions are abbreviated as follows:

(1) briefs in support of motion for summary judgment are cited as "motion";
(2) briefs in opposition to motions for summary judgment are cited as "opp.";
(3) reply briefs are cited as "reply".

The *Nyquist* Court squarely addressed this argument. Focusing on the term "primary," defendants there asserted that the Court had to decide whether the New York law had the "primary effect" of subsidizing religion or promoting the secular objectives the Court found to be legitimate. In holding that a finding of the former did not necessarily preclude a finding of the latter, the Court said: "We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it Also has the direct and immediate effect of advancing religion." *Id.* at 283 n.39, 93 S.Ct. at 2971 n.39. Thus, even if it could be demonstrated that students participating in the Voucher Program receive a superior education to children in the Cleveland Public Schools, this fact does not obviate this court's duty to further question whether the Program also has the direct and immediate effect of advancing religion.

Second, citing to only several of the most religiously restrictive characteristics in the "profile" developed by the *Nyquist* Court, Defendants seek to distinguish that case by arguing that the schools participating in the Voucher Program do not exhibit each and every characteristic set forth in the *Nyquist* profile. Specifically, they argue that whereas the benefitted schools in *Nyquist* placed religious restrictions on admission, over sixty percent of the students in the Voucher Program are not of the same faith as their school's sponsor.

There is nothing in the *Nyquist* opinion to suggest that a program of this type runs afoul of the Establishment Clause only when the schools have the exact profile as in that case. The Court made clear that no each of the schools fit the profile, explicitly stating that "the characteristics of individual schools may vary widely from [the] profile." *Id.*

at 768, 93 S.Ct. at 2963. More importantly, the *Nyquist* Court clearly did not rely on the fact that the schools in *Nyquist* were "extremely," as opposed to only "moderately" or "mildly" religious in reaching its conclusion. The relevant inquiry was whether schools were sectarian or nonsectarian. The *Nyquist* Court made this determination in part by reviewing the New York State Education Department records to identify whether such records listed a given school as church-affiliated. *Id.* at 768 n.23, 93 S.Ct. at 2963 n.23. The Court's conclusion that the vast majority of benefitted schools were sectarian was central to its finding that the program in *Nyquist* had the impermissible effect of advancing religion.

Finally, Defendants contend that because of the religious restrictions on admission, public school pupils could not enroll in the sectarian schools at issue in *Nyquist*. They maintain that this meant the sectarian schools in *Nyquist* received more money to educate their existing pupils in the same manner, thus acquiring extra funds to spend on religious icons, clergy salaries and the like. On the other hand, they argue, Voucher schools receive no such extra money because they must accept new, financially deprived children who are below grade level and need significant remedial assistance. According to Defendants, educating students with such needs costs the schools more than the payment they receive under the Voucher Program. *See, e.g.*, Def. Hanna Perkins Reply at 3; Def. Hanna Perkins Motion at 17. Furthermore, Defendants assert that the group who receives any "extra" money is parents, who are likely to spend it on "essential food, utilities or clothing." Def. Hanna Perkins Reply at 3-4.

Defendants' argument is not well-taken. The *Nyquist* program did not increase the amount of tuition received by the schools; it merely changed the source form which the

tuition originated. That is, the State relieved the parents of their existing tuition bills. Moreover, Defendants' argument incorrectly assumes that the money the Voucher schools receive as a result of the tuition grants will be used only for secular purposes. However, the tuition grants under the Voucher Program, like those in *Nyquist*, are unrestricted and can be used for any purpose a school finds necessary. That the grants do not fully compensate the schools for the cost of educating the children they accept under the Program does not alter this fact. Additionally, it is irrelevant that the funds in this case will benefit the parents of Voucher students. Parents clearly benefitted under the *Nyquist* program, as they do here. Nevertheless, as in *Nyquist*, the court must evaluate whether the Program *also* benefits the participating schools in such a way as to impermissibly foster religion.

Taken together, the fact that the Voucher Program overwhelmingly benefits sectarian schools and that the grants provided under the Program are not restricted to supporting only secular functions of a participating schools' educational program make it indistinguishable for the Establishment Clause purposes from the tuition reimbursement program in *Nyquist*. As in *Nyquist*, the funds provided under the Voucher Program directly aid the religious function of participating schools. In fact, the state aid under the Voucher Program provides an even more direct benefit to religious schools than did the aid in *Nyquist*. Even though parents must endorse their checks to the schools, the aid is given directly to participating schools. It can fairly be said that because the Program does not make aid available generally without regard to the nature of the institution benefitted, the Voucher Program results in government-sponsored religious indoctrination. Indeed, the Court's ultimate analysis of the *Nyquist* program under the "effects" test can be applied in this case by merely substituting "Ohio" for "New York": "[I]t is precisely the function of [Ohio's] law to provide

assistance to private schools, the great majority of which are sectarian.... [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783, 93 S.Ct. at 2971.

C. *Nyquist Has Not Been Overruled*

To the extent that Defendants argue implicitly in their motions for summary judgment, as they argued explicitly in their oppositions to Plaintiffs' motions for a preliminary injunction, that *Nyquist* has been "undermined" by a series of subsequent Supreme Court cases and should not be followed, the court must reject the argument. Since the court finds that *Nyquist* is directly relevant precedent, it is "constrained to follow it." *Simmons-Harris v. Zelman*, 54 F. Supp.2d 725, 735 (1999). In deciding to overrule one of its own precedents, the Supreme Court recently stated in *Agostini*:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent to this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.*

Agostini, 521 U.S. at 237, 117 S.Ct. 2017 (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22 (1989) (emphasis added). Thus, it is not within the power of this court to declare that a case decided by the United States Supreme Court should be overruled.

VI. ESTABLISHMENT CLAUSE JURISPRUDENCE SINCE *NYQUIST*

As previously discussed, the *Nyquist* Court did not have before it the type of case contemplated in footnote 38, wherein funds are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38, 93 S.Ct. at 2970 n.38. However, the Court was later confronted with just such a scenario in several cases following *Nyquist*. The dispute in the instant matter revolves around Defendants' contention that the Voucher Program fits within footnote 38 and cases following *Nyquist*. Accordingly, the court turns to a discussion of whether recent cases suggest there is a meaningful distinction between the program struck down in *Nyquist* and that which is being challenged in this case.

A. *Mueller*

In *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062 (1983), the U.S. Supreme Court upheld the constitutionality of a Minnesota statute which allowed state taxpayers to deduct, when computing their state income tax, certain tuition, transportation and educational expenses actually incurred in sending their children to elementary or secondary schools. It found that the program complies with each of the three parts of the *Lemon* test. The court determined that the program had a secular legislative purpose, stating:

> A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a

> state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.

Id. at 395, 103 S.Ct. at 3067.

The Court also concluded that the program did not have the primary effect of advancing religion. First, it explained that the tax deduction was one of many provided under the Minnesota tax laws and that its:

> decisions consistently have recognized that traditionally '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,' in part because the 'familiarity with the local conditions' enjoyed by the legislators especially enables them to 'achieve an equitable distribution of the tax burden.' Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.

Id. at 396, 103 S.Ct. at 3067-68 (citations omitted).

According to the Court, it was especially significant that the deduction was available for education expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools or sectarian private schools. *Id.* at 397, 103 S.Ct. at 3068. The Court found this aspect of the statute, as well as others, to be "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398, 103 S.Ct. at 3068. The Court found the tax deduction involved to be more like the type of program contemplated in footnote 38 of *Nyquist*, wherein the Court "intimated that 'public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' might not offend the Establishment Clause." *Id.* (citation omitted).

While acknowledging that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," central to the Court's reasoning was the fact that the assistance to parochial schools was channeled through parents rather than directly provided to the schools. *Id.* at 399, 103 S.Ct. at 3069. In *Mueller*, the nature of the program at issue necessarily incorporated several significant steps between the aid provided by Minnesota and the benefit religious schools might indirectly receive from such aid. Although the Court did not explicitly delineate these steps, some of them are apparent. At the outset, parents had to decide whether to send their child to public or private, tuition-charging schools. Next, they had to determine whether their child should attend a sectarian or nonsectarian private school. Once their child was enrolled in a private school, the tuition bill was due from parents up-front. Before being able to reap its benefits, it was necessary that parents

become aware of the tuition deduction. Finally, it was not certain that because their child attended a private school, parents would automatically take the deduction; rather, parents had to make the choice to take advantage of it. As the Court explained, "[t]he historic purposes of the [Establishment] [C]lause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400, 103 S.Ct. at 3070.

Because the Court found that the program in *Mueller* "neutrally provide[d] state assistance to a broad spectrum of citizens" and because "under Minnesota's arrangement public funds be[came] available only as a result of numerous, private choices of individual parents of school-age children," it concluded that the program did not have the primary effect of advancing religion. *Id.* at 398-99, 103 S.Ct. at 3069.

Defendants argue that because the Court in *Mueller* indicated it would not base the constitutionality of a program on the consideration of yearly statistical evidence reflecting the extent to which nonsectarian schools might benefit from the tax deduction,[10] this court should not consider statistical

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[10] Defendants base this argument on the following language from the *Mueller* opinion:

> We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the

evidence indicating the number of parochial schools involved in the Program. Defendants also contend that the Voucher Program complies with the dictates of *Mueller* and footnote 38 of *Nyquist* because it is a facially neutral program. Defendants assert that, because the Program is facially neutral, the challenged aid is made generally available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted. Therefore, they argue, any benefit received by a sectarian institution is received as a result of the private choice of the individual parents.

Contrary to Defendants' assertions, *Mueller* cannot fairly be read as repudiating the obligation of the courts in the first instance to see whether the state program is indeed genuinely neutral. The *Mueller* Court's refusal to consider annual reports reciting the number of parents who availed themselves of the tax deduction at issue must be evaluated in the entire context of its decision. Over the dissent of Justices Marshall, Brennan, Blackmun and Stevens, the Court found, on analysis, that the tax deduction was "made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution[s] benefitted" and that it benefitted religious institutions "only as a result of numerous private choices of individual parents of school-age children." 463 U.S. 399, 103 S.Ct. 3069. These two facts meant that the link between state aid and the religious schools was sufficiently attenuated such that the receipt of the tax deduction by private citizens did not offend the Establishment Clause. *See id.* ("Where, as here, aid to

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> tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Mueller, 463 U.S. at 401, 103 S.Ct. at 3070.

parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' can be deemed to have been conferred on any particular religion, or on religion generally." (Citation omitted)). In light of this conclusion, it follows that a statistical analysis indicating how may private citizens took advantage of the tax deduction could not weigh into the Court's analysis of the challenged statute's constitutionality. Whether 5% or 100% of students taking advantage of the deductions attended religious schools was of no constitutional consequence in the face of a determination by the Court that the options were neutral and that any aid benefitting religious institutions was the result of private choice.

Consideration of the number and percentage of sectarian schools participating in the Voucher Program is not forbidden by *Mueller*. Assessing the choices available to students in the Program by determining the number of participating religious schools versus the number of participating nonreligious schools is very different than annually taking account of the number of students who have availed themselves of a particular option. In other words, determining whether an aid recipient has neutral options available under a program is not the same as probing how the recipient has chosen to exercise those options. Indeed, the Court has employed a prospective analysis in post-*Mueller* Establishment Clause challenges in an effort to determine the availability of neutral options under a program. *See e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488, 106 S.Ct. 748, 752 (1986) (finding it significant that "the full benefits of the program [were not] limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients ha[d] full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a

huge variety of possible careers, of which only a small handful are sectarian.").

Defendants' reliance on *Mueller* for the proposition that the court should consider only the face of the relevant statute is also misplaced. On numerous occasions, the Supreme Court has held that, by itself, facial neutrality is insufficient to clear the effects test. For example, in *Bowen v. Kendrick*, 487 U.S. 589, 609-10, 108 S.Ct. 2562, 2574 (1988), the Court concluded:

> Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian."

In *Roemer, III v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747, 96 S.Ct. 2337, 2345 (1976), the Court held:

> Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and

> even though it makes its aid available to secular and religious institutions alike.

See also Rosenberger v. Rector and Visitors of the Univ. of Virginia et al., 515 U.S. at 846, 115 S.Ct. at 2525 (1995) (O'Conner, J., concurring) ("Neutrality, in both form and effect, is one hallmark of the Establishment Clause.").

Mueller itself adheres to this principle. The Court explicitly followed each step of the *Lemon* test—once it determined the program at issue had a secular purpose, it "turn[ed] ... to the more difficult but related question whether the Minnesota statute ha[d] 'the primary effect of advancing the sectarian aims of the nonpublic schools.'" *Id.* at 396, 103 S.Ct. at 3067 (quoting *Committee for Pub. Educ. V. Regan*, 444 U.S. 646, 662, 100 S.Ct. 840, 851 (1980) and *Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111). The Court determined that the program, *in addition* to being facially neutral, was also neutral in application because aid was provided without regard to the nature of the institutions benefitted and because aid only flowed to religious institutions as a result of the independent choices of parents. Accordingly, the program did not have the primary effect of advancing religion.[11]

On analysis of the Voucher Program's form and effect, the court finds it distinguishable from *Mueller* in at least two pertinent respects. First, under the Voucher Program, parents and their children do not have significant choice between parochial and nonparochial schools. The

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[11] Although Defendants also argue that the Tutorial Program contributes to the facial neutrality of the Voucher Program, they fail to assert how it contributes to the Voucher Program's neutrality in application. Accordingly, inasmuch as the court has concluded that facial neutrality is insufficient to satisfy the "effects" test, Defendants' argument relative to the Tutorial Program is not well-taken.

Program is structured such that eligible schools become registered schools only if they chose to accept the government's invitation to participate. Although the Voucher Program lists several adjacent school districts as eligible schools, none have registered for the Program. Because analysis of the Program's constitutionality requires consideration of where the challenged aid actually flows, the court is obligated to consider only registered schools, not eligible schools. Among registered schools, parochial schools overwhelmingly predominate. Therefore, this Program is unlike the tax program in *Mueller* where parents and children could make an independent choice between public and private schools, including religious schools, and where parents received a tax deduction for expenses associated with attendance at either.[12] Second, because parents of children in the Voucher Program do not have a significant choice between parochial and nonparochial schools, the nature of that choice is not sufficient to break the nexus between the government and the religious institution. Thus, parental choice under the Voucher Program is unlike that in *Mueller*, where the aid was found to be neutral and made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted.

B. *Witters*

The Supreme Court, in *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 106 S.Ct. 748 (1986), upheld the constitutionality of a State of Washington program extending vocational rehabilitation assistance to a

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[12] Citing with approval to the factual findings of the lower courts in that case, the Court in *Mueller* detailed "a range of educational expense" for which parents of public school children may claim the tax deduction. *See Mueller*, 463 U.S. at 391 n.2, 103 S.Ct. at 3064 n.2. This appeared central to the Court's conclusion that the program was neutral.

blind person attending a Christian college to become a pastor, missionary or youth director. The program at issue authorized the Washington Commission for the Blind to "[p]rovide for special education and/or training in the professions, business or trades so as to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Id.* at 483, 106 S.Ct. at 749 (citation omitted). The plaintiff in *Witters* wished to apply his grant to defray his tuition costs at the Inland Empire School of the Bible, the private Christian college where he was studying.

The Court had no trouble determining that the program satisfied the first part of the *Lemon* test. As the court explained, the purpose of the Washington program was "unmistakably secular [in that it] ... was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services." *Id.* at 485, 106 S.Ct. at 751. Further, the Court specifically noted that "no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education." *Id.* at 486, 106 S.Ct. at 751.

In addressing the effects prong of the test, the Court stated:

> The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the [constitutionally permissible] hypothetical salary donation [by a public employee to a religious institution], or is an impermissible "direct subsidy."

Id. at 488, 106 S.Ct. at 751. Unlike the *Nyquist* program, the vocational assistance program at issue did not amount to a direct subsidy because "any id provided under Washington's program that ultimately flow[ed] to religious institutions d[id] so only as a result of the genuinely independent and private choices of aid recipients." *Id.*

In reaching the conclusion that the link between the religious institution and the State was sufficiently attenuated, the Court found several aspects of the program pertinent. First, the vocational assistance was paid directly to the student, who could expend his or her education grant on wholly secular education if he or she wished. The program did not create a financial incentive for students to attend sectarian institutions because it did not provide any greater or broader benefits to students who chose to apply their aid to religious education. It was significant that:

> the full benefits of the program [were not] limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients ha[d] full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.... Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.

Id.

Upon analysis, the Court found that Washington's program fit within footnote 38 of *Nyquist* because "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' *Committee for Pub. Educ. & Liberty v. Nyquist*, 413 U.S. at 782-83 n.38, 93 S.Ct. at 2970 n.38, and is in no way skewed toward religion . . . ." *Id.* As the Court determined, "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Mueller*, 474 U.S. at 489, 106 S.Ct. at 752.

Defendants point to *Witters* as support for essentially the same arguments they raise in connection with *Mueller*. As the Senel-Taylor Intervenors/Defendants state, *Witters* "stands for the proposition that a facially neutral program that offers benefits to a class defined without reference to religion does not have a primary effect of advancing religion where any aid to religion results from the private choices of individual beneficiaries, even where a very high proportion of the beneficiaries are using their benefits to pursue a religious option." Def. Taylor Opp. At 14. The court does not disagree with this statement. Nevertheless, it does not agree that *Witters* should change the outcome of this case.

The court first incorporates its discussion regarding *Mueller* herein as much of it directly relates to Defendants' contentions with regard to *Witters*. Next, it will briefly explain why *Witters* is perhaps even easier to distinguish from the instant case than *Mueller*. First, in *Witters*, the student had a genuine choice between attending sectarian or nonsectarian and public or nonpublic institutions. Indeed, he had a choice between pursuing religious and nonreligious vocations, and as a practical matter, had a great many more nonreligious options. Because he could utilize the aid

however he chose, the provision of the scholarship would have no effect on his choice of an institution. Benefits would not accrue "in large part or in whole" to students at sectarian institutions. In fact, under the program, only a "minuscule" amount of aid would ever flow to religious institutions, and the program was not in any way skewed toward religion. Though religious institutions might ultimately benefit, it would be only as a direct result of the choice of recipients, not as the result of the State directly providing a benefit.

To the contrary, students in the Voucher Program have no meaningful choice between attending sectarian or nonsectarian schools. That choice is essentially made for them as a function of the fact that almost all participating schools are religious in nature. Unlike in *Witters*, nearly all state aid under the Voucher Program will flow to religious institutions. It cannot be said that this aid flows to those institutions as a result of the choice of the Program beneficiaries since nearly all the schools participating are religious. Accordingly, it is not true, as it was in *Witters*, that the Voucher Program "is in no way skewed toward religion;" in fact, just the opposite is true here. Thus, *Witters* does not apply to this case because it is not true under the Voucher Program that "aid to religion results from the private choices of individual beneficiaries."

C. *Zobrest*

In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S.Ct. 2462 (1993), the Supreme Court held that providing the services of an interpreter to a deaf student attending a Catholic high school pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1407 *et seq.*, and its Arizona counterpart did not violate the Establishment Clause. The student had previously attended public school where he was furnished such an interpreter.

Holding that the reasoning of *Mueller* and *Witters* applied to the program at issue, the Court found that the effect of the government program was not to promote religion. *Id.* at 10, 113 S.Ct. at 2467. Rather, the services at issue were part of a general program that "distribute[d] benefits neutrally to any child qualifying as 'disabled' under IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attend[ed]." *Id.* The Court reasoned:

> [b]y according parents freedom to select a school of their choice, the statute insures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.
>
> * * *
>
> When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed toward religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Id. (citations omitted). Indeed, the Court found the case to be easier than *Mueller* and *Witters* because no state monies that were traceable to the government ever went to religious institutions. *Id.*

It was also significant that the IDEA did not relieve the school at which the student wished to utilize the services of his interpreter of an expense it otherwise would have assumed in educating its students. *Id.* at 12-13, 113 S.Ct. at 2468-69. In other words, the Court intimated that even programs in which money does not directly flow to the coffers of a religious institution can still violate the Establishment Clause if aid is provided in such a way as to free up institution funds that would otherwise have been expended on essential, religious or nonreligious, functions. However, because the IDEA neither gave money directly to schools nor relieved them of expenses they would otherwise have borne, it did not amount to an impermissible direct subsidy to sectarian institutions. As the Court explained, because aid only went to religious institutions as a result of the genuinely independent choices of recipients, "[d]isable[d] children, not sectarian schools, [were] the primary beneficiaries of the IDEA; to the extent sectarian schools benefit[ted] at all from the IDEA, they [were] only incidental beneficiaries. Thus, the function of the IDEA [was] hardly to provide desired financial support for nonpublic, sectarian institution." *Id.* at 13, 113 S.Ct. at 2469 (citation omitted).

Finally, the Court reasoned that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.* It would not assume that the sign-language interpreter would do anything more than "accurately interpret whatever material [was] presented to the class as a whole." *Id.* As the Court stated, "ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended." *Id.*

Any argument by Defendants that the Voucher Program is constitutional under *Zobrest* is not well-taken. As discussed above, the Voucher Program is not neutral because it does not make aid available generally without regard to the

nature of the institutions benefitted. Since more than 82% of the schools participating in the Program are sectarian in nature, it also cannot be said that aid only flows to sectarian institutions as a result of the genuine and independent choice of aid recipients. Furthermore, unlike the IDEA, the Program does directly subsidize sectarian institutions. Because all monies under the Program flow directly to the coffers of religious schools, it is unnecessary to take the next step as the Court did in *Zobrest* and determine whether the Program relieves the schools of expenses they otherwise would have had to bear. Moreover, as the funds are unrestricted, there are no safeguards in the Voucher Program to ensure that they will be used only for secular instruction. Finally, it is important that *Zobrest* is factually dissimilar from this case. Central to the Court's decision was a rejection of the notion that the presence of a public employee in a sectarian school automatically violates the Establishment Clause, especially in the case of a sign language interpreter, who could neither add to nor subtract from the learning environment. On the other hand, where a school receives direct, unrestricted funds for its educational program, it hardly can be said that such aid does not result in indoctrination.

D. *Agostini*

The most recent case to hold that a governmental program which provided benefits to religious schools withstood an Establishment Clause challenge is *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997). In that case, the Supreme Court overruled its prior decisions in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400, 105 S.Ct. 3216, 3248 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997). In *Aguilar*, the Court had held that the Establishment Clause barred New York City

from sending public school teachers into parochial schools to provide remedial education to disadvantaged children under a congressionally mandated program, Title I of the Elementary and Secondary Education Act of 1965. In *Ball*, the Court found unconstitutional a program implemented by the City of Grand Rapids, Michigan, under which nonpublic school students were taught supplemental courses by public school teachers during the regular school day on the premises of nonpublic schools. *Agostini*, 521 U.S. 218-22, 117 S.Ct. at 2008-10.

In overruling *Aguilar* and *Ball*, the Court affirmed that the basic principles of Establishment Clause jurisprudence had not changed. However, it announced a restructuring of the *Lemon* test. It concluded that the test should be viewed as having two prongs instead of three. The first would continue to be the secular purpose prong and the second would continue to be the effects prong. According to the Court, consideration of whether a program fosters excessive entanglement between church and state, formerly the third prong of the *Lemon* test, should more properly be considered "as an aspect of the inquiry into a statute's effect." *Id.* at 233, 117 S.Ct. at 2015. The Court also clarified the criteria used to determine whether government aid has the effect of advancing religion, indicating that the Court currently employs three criteria: whether the challenged governmental aid (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Id.*

In analyzing its post-*Aguilar* and *Ball* decisions, the Supreme Court concluded that the approach used to assess religious indoctrination had changed in "two significant respects." *Id.* at 223, 117 S.Ct. at 2010. First, citing primarily to *Zobrest*, the Court explained that it had rejected the two principle presumptions upon which *Ball* and *Meek v.*

Pittinger, 421 U.S. 349, 95 S.Ct. 1753 (1975), had rested. The first of these discarded presumptions was "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* The Court stated: "There is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures." *Id.* at 226, 117 S.Ct. 2012. The second abandoned presumption was that "the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion." *Id.* at 224, 117 S.Ct. at 2011. According to the Court, there is no "perceptible ... difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside." *Id.* at 227, 117 S.Ct. 2012.

Second, citing *Witters*, the Court indicated that it had departed from the rule "that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225, 117 S.Ct. at 2011. The Court went on to explain that departure is warranted in programs that are in conformity with the requirements discussed in footnote 38 of *Nyquist*, such as *Witters*. According to the Court, direct aid programs in which grants are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" are constitutional. *Id.* at 225, 117 S.Ct. at 201 (quotations omitted). The Court also reiterated that programs like those in *Witters* and *Zobrest*, where money ultimately goes to religious institutions "only as a result of

the genuinely independent and private choices of" individuals, satisfy footnote 38's criteria. *Id.* at 226, 117 S.Ct. at 2012. In such cases, religious indoctrination could not be attributed to the state.

It was also significant that under current law, the Court could not conclude that placing public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. *Id.* at 228, 117 S.Ct. at 2012. First, aid under Title I was provided to students regardless of the school they chose to attend. Second, relying on the reasoning in *Zobrest*, the Court found it important that, by law, Title I services were supplemental to the schools' regular curricula. *Id.*, 117 S.Ct. at 2013. As the Court stated:

> These services do not, therefore, 'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.' *Zobrest*, 509 U.S., at 12, 113 S.Ct., at 2468.... Title I services are [not necessarily] distributed ... 'directly to the religious schools'.... In fact, they are not. No Title I funds ever reach the coffers of religious schools, compare *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 657-659, 100 S.Ct. 840, 848-849 (1979) (involving a program giving 'direct cash reimbursement' to religious schools for performing certain state mandated tasks).

Id. See also Peck v. Lansing Sch. Dist., 148 F.3d 619 (1998) (finding that federally funded program providing services on parochial school campuses does not run afoul of the Establishment Clause as long as instruction is supplemental to regularly provided services, award of funding is based on

neutral criteria, and program imposes adequate safeguards to ensure that instruction provided is secular).

The Court stated in regard to the second effects criteria, that the program not "define its recipients by reference to religion":

> A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. Witters, supra, at 488, 106 S.Ct., at 752 (upholding neutrally available program because it did not "create a financial incentive for students to undertake sectarian education"); Zobrest, supra, at 10, 113 S.Ct., 2467 (upholding neutrally available IDEA aid because it "creates no financial incentive for parents to choose a sectarian school").

Id. at 230-32, 117 S.Ct. at 2014. The above-cited quote makes it clear that if a program is found not to involve state indoctrination, it may still run afoul of the Establishment Clause based on the ground that the criteria for participation in the program provides an incentive to pursue religious indoctrination. Applying this principle to the program in *Agostini*, the Court found that no such incentive to pursue indoctrination was present. As it stated: "Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what

their religious beliefs or where they go to school."[13] *Id.* at 232, 117 S.Ct. at 2014 (citations omitted).

The court does not find that *Agostini* undermines the vitality of *Nyquist* or otherwise supports Defendants' argument that the Voucher Program does not violate the Establishment Clause, made clear that the circumstances where such aid is permissible are in the context of cases like *Witters*, a class of cases different that that in *Nyquist*. In reversing its prior decision in *Aguilar* so that Title I services could be provided to students on the grounds of religious institutions, *Agostini* simply allowed students attending parochial schools to obtain remedial educational benefits which were made generally available to qualifying students without regard to the nature of the institution attended. Indeed, in *Agostini*, no monies ever went into the coffers of the religious institution and there clearly was no direct support for such institutions. The provision of services also would have no effect on a student's choice of what school to attend because the services could be utilized at any school. In one sense, such a program is similar to providing textbooks in math or science to all students regardless of the school they attend.

An analysis of the Voucher Program under the *Agostini* framework makes it clear that it runs afoul of both the indoctrination prong and the financial incentives prong of the effects test. First, this is not a program made neutrally available without regard to the religious-nonreligious, public-nonpublic nature of the institutions to be benefitted. Since there are very few nonreligious options for eligible students, one also cannot say that the decision to attend a religious

[13] The Court ultimately found the Title I program constitutional because it also did not violate the third prong of the "effects" test as it did not create excessive entanglements between church and state.

school under the Voucher Program was made as a result of the genuinely independent choice of aid recipients. As discussed above in connection with *Zobrest*, it is unnecessary to determine whether the Voucher Program "reliev[es] sectarian schools of costs they otherwise would have borne in educating their students" because funds go directly to the coffers of religious schools. Again, there are no limitations on how the funds are to be used; thus, there are no adequate safeguards to ensure that instruction provided is secular. Accordingly, this is not the type of case in which the Court would find it warranted to depart form the rule that government aid that directly aids the educational function of a religious institution is invalid.

Second, program criteria create incentives for students to attend religious schools. Contrary to *Agostini*, students in the Voucher Program may not use their vouchers at any school they wish. Rather, they must attend a school that has chosen to participate in the Voucher Program, and the overwhelming majority of such schools are sectarian in nature. Accordingly, the provision of the services under the Voucher Program directly impacts whether a recipient chooses a religious institution.

Thus, the court concludes that the Voucher Program violates the Establishment Clause under *Agostini* because it results in prohibited governmental indoctrination and because it defines its recipients by reference to religion.

E. *Rosenberger*

The State relies upon *Rosenberger v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, 115 S.Ct. 2510 (1995), for the contention that it would be unconstitutional to exclude religious private schools from the Voucher Program, as such exclusion based solely on religion

would be content-based discrimination in violation of the Free Speech Clause and would deprive religious schools and families of their equal right to pursue religious study.[14] Def. Memo in Supp. Of Motion to Dismiss at 1. In *Rosenberger*, the University of Virginia had established a Student Activities Fund ("SAF") to which student groups could submit disbursement requests for certain extracurricular activities, including the printing of student publications. The SAF received its money from a mandatory fee assessed per semester to each full-time University student. "Religious activities," those activities which "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality," were excluded from SAF support. *Id.* at 824-825, 115 S.Ct. at 2514-15.

When one student group published a magazine entitled "Wide Awake: A Christian Perspective at the University of Virginia," the Student Council Appropriations Committee refused to authorize payment of the magazine's printing costs on the ground that it was a "religious activity." The student group filed suit, alleging that the University's refusal to authorize payment solely on the basis of the publication's religious editorial viewpoint violated its rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law. *Id.* at 837, 115 S.Ct. at 2520.

The State's argument is premised on the erroneous assumption that the present situation, like *Rosenberger*, offers only two alternatives. In *Rosenberger* there were two clear alternatives—the University could either provide funding, or refuse funding, of the student publication. The State urges that if the court finds the Voucher Program

[14] The State primarily raised this argument in its motion to dismiss, but incorporated it by reference into their motion for summary judgment.

unconstitutional, there is only one alternative left: to exclude all sectarian schools from any such program, based solely on their religious affiliation. Essentially, Defendants invite this court to render an advisory opinion on the constitutionality of such an alternative. The court declines Defendants' invitation. It simply holds that a program which provides no meaningful choice to scholarship recipients other than to attend sectarian schools violates the Establishment Clause.

F. *Revelance of Non-Program Options*

Defendants argue that, when the entire universe of educational alternatives offered by the State of Ohio is considered, the Voucher Program is but one "choice" among many, primarily nonsectarian, educational options. They include community schools and magnet schools among the options the court should consider alongside the Voucher Program.[15] The maintain that "the Scholarship Program, as part of the State's experimentation with various forms of school choice, is a genuinely neutral form of 'public assistance'—like the G.I. Bill—that satisfies the standard the Supreme Court articulated in the well-known footnote 38 of its *Nyquist* decision." Def. State Motion at 14. For the

[15] Community schools are state-funded, nonreligious institutions that are independently operated by self-elected governing boards. Students are admitted to these schools on the basis of lottery. Magnet Schools are "for elementary students focused on the arts, foreign language, computers and science, or other distinctive curricular approach, and may provide Montessori methods and programs emphasizing basic skills." State Defendants' Motion for Summary Judgment at 15-16. Students are accepted into magnet schools by application only; however, assignments are based on lottery when the number of eligible applicants exceeds the number of slots at a particular school. *Id.*

reasons discussed below, the Defendants' position is not well-taken.[16]

The Supreme Court has generally grounded its decisions upholding the programs which provide some type of aid to educational institutions against Establishment Clause challenges on two related principles. The first, that programs which are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" do not offend the Establishment Clause, comes directly from *Nyquist's* footnote 38. *See Nyquist*, 413 U.S. at 783 n.38, 93 S.Ct. at 2970 n.38. The second, that a program does not violate the Establishment Clause if aid inures to the benefit of a religious institution "only as a result of the independent and private choices of aid recipients," is essentially footnote 38 in application. *Witters*, 474 U.S. at 488, 106 S.Ct. at 752. Both principles, if they are to mean anything, must be applied within the context of the challenged program. The relevant inquiry in any

[16] Defendants' proposed analysis of the educational choices available to students eligible for the Voucher Program is similar to that applied by the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). In *Jackson*, the court considered the Milwaukee Parental Choice Program ("MPCP"), a program in which the State provided money for up to 15% of the student membership of the Milwaukee Public Schools to attend private sectarian or nonsectarian schools. In analyzing the constitutionality of the MPCP, the court considered the program in the context of "pre-existing educational choices available to MPS children." *Id.* at 614 n.9. Ultimately, the court concluded that the MPCP is neutral and is in no way skewed toward religion. *Id.*

Although the *Jackson* court considered the MPCP in the entire context of educational alternatives available to students, its analysis fails to fully explain its reasoning for doing so. Specifically, the court does not indicate why the funds challenged in that case should be considered in conjunction with funds that were not challenged. As will be discussed herein, under existing Supreme Court precedent, this court cannot adopt the analysis employed by the *Jackson* court.

Establishment Clause challenge is whether the choices available under the program at issue are broad enough so as not to influence recipients to choose a religious alternative, not whether the entire universe of options available, both within and outside the program, are sufficient to ensure that a recipient's decision to choose a religious alternative can be considered independent of state influence. In other words, the concern of the Clause is not whether a party has choices beyond those provided by a state aid program, but whether, when one chooses a state program—perhaps over other choices—he can exercise his options within that program without being steered toward a religious institution.[17]

There are two points at which parents must make decisions with regard to sending a child to a Voucher school. First, they must decide whether to enroll their child in the Program. Second, upon deciding to do so, parents must select a school. The court's analysis must necessarily take into account the alternatives available under the latter choice as opposed to the former because it is the Voucher Program that has been challenged. Conducting this analysis reveals that the alternatives available under the Program are so narrow that a recipient's decision to attend a religious school cannot reasonably be said to have been made "only as a result of [his or her] independent and private choices."

Accepting Defendants' argument that the constitutionality of the Voucher Program should be analyzed at the point at which parents first decide whether to enroll their children in the Voucher Program as against all other available options would stand Establishment Clause jurisprudence on its head. In almost any program that could

[17] To the extent that Defendants argue that the Tutorial Program should be considered an educational option, based upon the reasons articulated in this section, such argument is not well-taken.

come under attack under the Clause, there are likely a myriad of alternatives a recipient must choose between from ever deciding whether to take advantage of the program's benefits. If courts were to take into account such alternatives, which in many instances would arguably not be comparable to those offered under the challenged program, it would be a rare case in which a program providing aid to a religious institution would even come close to violating the Establishment Clause.

A review of the relevant cases reveals that the Supreme Court has always assessed the question of "choice" within the context of the challenged program and that the court has never gone so far as to undertake an analysis like the one Defendants argue this court should adopt.[18] In *Witters*, for example, the Court looked to the options available to blind students to utilize monies available to them under the State of Washington's vocational rehabilitation assistance program. It found that there was sufficient options regarding the institutions at which the assistance might be

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[18] The Defendants argue that *Mueller* supports their position because the Court there took into account the fact that the tax deduction at issue was one of many provided under the Minnesota tax laws. This argument disregards the fact that a significant basis for the Court's opinion was that, unlike the Voucher Program, the tax deduction benefitted children attending public schools; private, nonsectarian schools and private sectarian schools alike. In other words, the "choice" question in *Mueller* was, in fact, whether the challenged program applied to all students equally.

Moreover, a reading of the Court's opinion reveals that it considered the tax deduction at issue as part of the State's entire tax scheme because "[l]egislatures have broad latitude in creating classifications and distinctions in tax statues ... [and therefore,] the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes [was] entitled to substantial deference." *Mueller*, 463 U.S. 396, 103 S.Ct. at 3068 (citations omitted).

utilized such that the Court could conclude that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent private choices of aid recipients." *Id.* at 488, 106 S.Ct. at 752. In reaching its decision, the Court did not concern itself with the full range of possible options that a blind student might have apart from funds received from the program to achieve his or her educational and vocational goals. The Court in no way suggests that it would be appropriate to look at these other options in an effort to determine whether any money which flows to a religious institution under a challenged program is a result of the genuine private choice of the individual.

Defendants seek to distinguish this case from *Nyquist* by arguing, in essence, that the state of the art in education did not include magnet schools and community schools at the time of that decision. Whether or not that proposition is true as a matter of fact, there is nothing in the Court's opinion to suggest that it would have considered such information had it been available. The concern of the Court was with the fact that one wishing to utilize tuition grants under the program had very few nonreligious as compared to religious options. Thus, as under the Voucher Program, there was an incentive for persons to utilize state funds under the program to attend religious institutions. Like the instant case, one could not say that the choices made by parents under the *Nyquist* program were the result of the genuine private choices of participating individuals.

The "choices" available to a Voucher student are more analogous to those offered in *Nyquist* than those in cases like *Witters*, *Mueller* and *Zobrest*. In *Witters*, the student applying for vocational rehabilitation assistance under the Washington statute could take the assistance he had been awarded and put it to use at any college within the State

of Washington. In *Mueller*, parents of children attending any elementary or secondary school in the State of Minnesota, whether public or private, sectarian or nonsectarian, could take advantage of the tax deduction for school expenses. In *Zobrest*, the deaf student who required an interpreter under the IDEA could utilize the skills of his interpreter at any high school in the United States. In stark contrast to *Witters*, *Mueller* and *Zobrest*, a student who receives a voucher under the Program may apply the voucher ***only*** at one of the schools participating in the Voucher Program. Because a Voucher student must apply his or her voucher at one of only fifty-six participating schools, over 82% of which are sectarian, a Voucher student has no meaningful choice at all. Unlike the funds in *Witters*, *Mueller* and *Zobrest*, funds under the Voucher Program flow to religious institutions, not as a result of the "genuinely independent private choices of aid recipients," but rather as a result of the very nature of the Program.

VII. CONCLUSION

The separation of church and state was of prime importance to some of the most influential founders and framers of the United States Constitution. Yet it has long been recognized that it is probably not possible or desirable to erect a complete wall between the two. "[A] scrupulous neutrality by the state, as among religions and also as between religious and other activities ... is what is required." *Roemer, III v. Board of Pub. Works of Maryland*, 426 U.S. 736, 745-46, 96 S.Ct. 2337, 2344 (1976). As a result, some types of governmental aid to religious institutions do not implicate the concerns which underlie the Establishment Clause or run afoul of its requirements, while other types do. Remote, incidental or indirect aid that flows to religious educational institutions does not violate the Clause. On the other hand, aid which is provided to directly support the

educational program of such an institution, especially religious instruction and indoctrination, is normally prohibited.

The Supreme Court has carved out an exception to this general rule. Where a program is found to have a permissible secular purpose and does not foster an excessive entanglement between church and state, it will be upheld against an Establishment Clause challenge as long as two principles are satisfied. First, a program must not result in government-sponsored religious indoctrination. Where aid is provided under a neutral program and only flows to religious schools as a result of the genuine and independent choices of beneficiaries, a challenged program will not be found to result in government inculcation of religious beliefs. Second, program criteria must not create incentives for students to attend religious schools.

The Voucher Program has a valid secular purpose and there has been no challenge that it creates an excessive entanglement between church and state. Accordingly, the question in this case is whether the Program has the impermissible effect of advancing religion by resulting in government indoctrination of religious beliefs or creating an incentive to attend religious schools. After thoroughly reviewing the submissions of the parties, the court concludes that there are no genuine issues of material fact and that the Voucher Program violates the Establishment Clause as a matter of law because it violates both of these principles.

In all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down in *Community for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973). Like *Nyquist*, only private schools receive any funds under the Program. As in *Nyquist* the vast majority of

schools participating in the Voucher Program are sectarian. Of the fifty-six schools which are authorized participants, forty-six, or over 82%, are religiously-affiliated. Moreover, similar to *Nyquist*, the tuition grants provided under the Program are unrestricted. There has been no attempt to guarantee that state aid only supports secular, as opposed to religious, educational functions of participating schools. Indeed, some recent Supreme Court cases have suggested that even programs in which money does not directly flow to the coffers of a religious institution can still violate the Establishment Clause if aid is provided in such a way as to free up institution funds that would otherwise have been expended on essential, religious or nonreligious, functions.

The court is not persuaded by Defendants' arguments that post-*Nyquist* cases suggest there are meaningful distinctions between this case and *Nyquist*. It is significant that every case cited by Defendants in which the Supreme Court sustained programs providing aid to religious educational institutions against Establishment Clause challenges explicitly discusses and distinguishes itself from *Nyquist*. Each of these cases dealt with programs in which aid was "made available generally without regard to the sectarian, nonsectarian or public, nonpublic nature of the institutions benefited," a type of program the *Nyquist* Court expressly acknowledged it did not have before it. *See id.* at 782-783 n.38; 93 S.Ct. at 2970 n.38. Moreover, under every program, religious schools were merely incidental or indirect beneficiaries because aid benefitted them "only as a result of the genuinely independent private choices of aid recipients." *Witters v. Washington Dep't of Sevs. For the Blind*, 474 U.S. 481, 106 S.Ct. 748 (1986). *See also Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062 (1983). Additionally, none of the programs at issue in post-*Nyquist* cases incorporated eligibility criteria which impermissibly created incentives to

attend religious institutions. None of them allocated aid on the basis of criteria that either favored or disfavored religion.

This case is unlike any case in which the Supreme Court has upheld programs providing aid to religious educational institutions. Because the vast majority of schools participating in the Voucher Program are sectarian in nature, the Program does not make aid available without regard to the nature of the institutions benefitted. Likewise, recipients do not have available to them the kind of "choice" contemplated by post-*Nyquist* cases. By the very nature of the Program, parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate. Unlike cases decided after *Nyquist*, the aid provided under the Voucher Program directly benefits the religious functions of participating sectarian institutions because it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of recipients. Thus, the Program has the effect of advancing religion through government-supported religious indoctrination.

The Voucher Program is also unlike post-*Nyquist* cases in that program criteria create incentives for students to attend religious schools. Voucher students may only redeem their vouchers at schools which have registered and are authorized to participate in the Program, not at any school of their choice. Because the vast majority of participating schools are sectarian in nature, the Program directly influences whether a recipient chooses to attend a religious institution.

It is important to note that this court does not rest any portion of its decision on an inquiry into, or a determination of, the number of students actually attending religious institutions under the Voucher Program. While it is

impermissible to determine the constitutionality of a genuinely neutral program on a year-to-year assessment of the extent to which beneficiaries pursue religious versus nonreligious options, it is incumbent on a court to determine whether a challenged program contains genuine nonreligious options. Undertaking this determination, this court concludes that the Voucher Program is not neutral. Because of the overwhelmingly large number of religious versus nonreligious schools participating in the Voucher Program, beneficiaries cannot make a genuine, independent choice of what school to attend. A program that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools. For both of these reasons, the court finds the Program to be in violation of the Establishment Clause.

Accordingly, the court grants the Motions for Summary Judgment of Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* (Doc. Nos. 83 and 97, respectively), and hereby denies the Motions for Summary Judgment of Intervening Defendants Senel Taylor, *et al.* and the State Defendants, *et al.* (Doc. Nos. 82 and 92, respectively). The State Defendants are permanently enjoined from administering the Voucher Program.

Because counsel for all Plaintiffs have consented to a stay of this court's Order pending Sixth Circuit review, this court hereby stays said Order in its entirety pending such review. *See* Order of December 8, 1999 (Doc. No. 127).

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix D

Friday, November 5, 1999

ORDER IN PENDING CASE

99A320

ZELMAN, SUPT. OF PUBLIC INSTRUCTION, ET AL., V. SIMMONS-HARRIS, DORIS, ET AL.

Treating the application as a request for a stay of the preliminary injunction, the application for stay presented to Justice Stevens and by him referred to the Court is granted. The preliminary injunction entered by the United States District Court for the Northern District of Ohio, case No. 99 CV 1740, on August 24, 1999, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Sixth Circuit.

Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer would deny the application for a stay.

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	)	Case No.: 1:99CV1740
Plaintiffs	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO,	)	
Defendant	)	
SUE GATTON, et al.,	)	Case No.: 1:99CV1818
Plaintiffs	)	
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, et al.,	)	[Filed: August 27, 1999]
Defendants	)	ORDER

Currently pending before the court, pursuant to Fed. R. Civ. P. 62(c), is the State Defendants' Motion to Stay the court's August 24, 1999, order granting Plaintiff's Motion for Preliminary Injunction. Both sets of Plaintiffs have filed a Joint Brief in Opposition to the Motion to Stay. For the reasons set forth below, the State Defendants' Motion to Stay (Doc. No. 49 in Case No. 1:99CV1740; Doc. No. 25 in Case No. 1:99CV1818) is granted in part and denied in part.

On June 29, 1999, Ohio Amended Substitute House Bill No. 282 ("Education Budget Bill") was passed by the Ohio State Legislature, instructing the Ohio State Superintendent of Public Instruction to establish the Pilot Project Scholarship Program ("Program"). Twenty-one days later, on July 20, 1999, a group of plaintiffs filed Case No.: 1:99CV1740, challenging the constitutionality of the Program. On July 29, 1999, a separate set of plaintiffs filed a second action, Case No.: 1:99CV1818, challenging the constitutionality of the Program. These cases have been consolidated. On August 2, 1999, the court scheduled a preliminary injunction hearing for August 13, 1999, and an August 4, 1999, telephonic conference with counsel was scheduled for the purpose of setting the format and procedure of the preliminary injunction hearing. As a result of the August 4, telephonic conference, counsel for all parties agreed to shorten the normal period for filing responsive briefs. On August 13, 1999, a preliminary injunction hearing was conducted in which the court entertained oral argument from counsel representing the parties in both cases as well as two sets of proposed interveners. After considering all submissions on behalf of all the parties and the arguments of counsel, this court issued its twenty-eight page order on August 24, 1999, granting Plaintiffs' Motion for a Preliminary Injunction.

In the court's preliminary injunction order, it concluded that Plaintiffs were likely to succeed on the merits in this case because the Cleveland Pilot Scholarship Program was sufficiently similar to the New York Program in *Committee for Public Education and Liberty v. Nyquist*, 413 U.S. 756 (1973), that the Supreme Court found to be in violation of the Establishment Clause of the First Amendment to the U.S. Constitution. Specifically, this court concluded "that Plaintiffs have a very substantial chance of succeeding on the merits. The Cleveland Program does not make aid available without regard to the nature of the schools to be benefitted. The participating schools are overwhelmingly sectarian. This means that parents cannot make an educational choice without regard to whether the school is parochial or not. Therefore, the Cleveland Program has the primary effect of advancing religion." The court further found, after consideration and balancing of all the pertinent factors, that the strength of Plaintiffs' case caused the balance to tip in favor of granting the injunction. The court reiterates that ruling, in all aspects, herein.

However, the court has decided to grant a limited stay in this action because of the timing of the events leading up to the issuance of the court's order on August 24, 1999. It should not be surprising that Plaintiffs' challenge came near the end of July or that the court's ruling came on August 24, 1999. A ruling close to the beginning of school or after school started was inevitable in light of the late date on which the bill authorizing the 1999 Pilot Program was passed. This timing caused disruption to the children previously enrolled in the Program beyond that normally associated with a student's transferring from one school to another. To make as little incursion as is possible on the existing preliminary injunction, the court will expedite the process for the hearing on the permanent injunction in this matter. The court finds that it is also in the interest of the parties and the children in

the Program to have a speedy, final resolution of the matters rather than a piecemeal resolution involving several possible stages at which the children's education might be disrupted. Therefore, the court grants the State Defendants' Motion to Stay with the following modifications:

(1) The stay is applicable to only those students who were enrolled in the Pilot Program under the 1995 Act during the last academic year; it is not applicable to students who are new enrollees;

(2) The stay shall extend only for one semester or until the court renders a final decision on permanent injunctive relief, whichever is sooner; and

(3) Therefore, the court sets the following schedule for trial of this action:

(a) Counsel shall confer and work out a discovery schedule regarding any pertinent issues, including those which specifically bear on whether or not the Program involved has a primary effect of advancing religion and whether it avoids excessive entanglements under applicable Supreme Court precedents, by September 6, 1999. The proposed schedule shall ensure completion of all discovery by October 29, 1999;

(b) The court will hold a telephonic conference with counsel on September 7, 1999, at 1:00 p.m., to discuss the discovery schedule;

(c) Any dispositive motions must be filed by November 15, 1999; responses are due by November 29, 1999. Replies are due by December 8, 1999; and

(d) Trial of this action shall commence on December 13, 1999, at 9:00 a.m.

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	)	Case No.: 1:99CV1740
Plaintiffs	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO,	)	
Defendant	)	
SUE GATTON, et al.,	)	Case No.: 1:99CV1818
Plaintiffs	)	
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, et al.,	)	[Filed: August 24, 1999]
Defendants	)	ORDER

I. *INTRODUCTION*

Currently pending before this court in consolidated actions are motions seeking to preliminarily enjoin the Ohio Pilot Scholarship Program on the ground that it violates the Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the U.S. Constitution. The Court held a hearing on such motion on August 13, 1999. No testimony was taken. The parties stipulated that the Court should consider the affidavits submitted by each party in support of their position.

Case No. 1:99CV1740 was filed on July 20, 1999, by Plaintiffs Doris Simmons-Harris, the parent of a minor child who will be a pupil in the Cleveland City School District in the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvador Church in Lorain, Ohio against Defendant Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education.

Case No: 1:99CV1818 was filed on July 29, 1999, by Plaintiffs Sue Gatton, chairperson of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glenn Altschuld, Ohio taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education; the State of Ohio, through its General Assembly, Governor and other agents; and Sandra Berry, in her official capacity as Program Administrator for the Ohio Pilot Scholarship Program.

There are two groups seeking intervention in both cases. The first group consists of parents of students who have been enrolled, or seek to enroll, in private schools under the program. That group includes Senel Taylor, parent of a ten-year old child who has attended private school under the program for the last two years; Johnnietta McGrady, parent of two children who seek to attend a private school under the program; Christine Suma, parent of three children who have attended private school under the program and one child who is on a waiting list to attend private school under the program; Arkela Winston, parent of two children who have attended private school under the program; and Amy Hudock, parent of a child who has attended private school under the program for the past three years.

The second group of interveners includes nonpublic schools and parents of students who wish to participate in the program. That group includes Hanna Perkins School, Ivy Chambers, Carol Lambert, Delories Jones, Our Lady of Peace School, Westpark Lutheran School and Lutheran Memorial Association of Cleveland.

The Scholarship Program challenged in this action was enacted by the Ohio Legislature on June 29, 1999, as part of the Education Budget Bill. *See* Ohio Revised Code § 3313.974-3313.979. It is in all respects pertinent to this litigation, the same as the original Pilot Scholarship Program enacted by the Legislature in 1995, which was operative for three successive school years. The 1995 Program was stricken down by the Ohio Supreme Court in *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). The Court held that the Program was enacted in violation of Section 15(D), Article II, of the Ohio Constitution in "that creation of a substantive program in a general appropriations bill violates the one-subject rule" found in that provision. *Id* at 216. The

Ohio Supreme Court also addressed the federal constitutional issue raised in that case, whether the Pilot Program violated the Establishment Clause of the First Amendment. It concluded, contrary to the Ohio Court of Appeals, that it did not.

The 1995 Pilot Program was enacted by the Ohio Legislature to address an educational crisis in the public schools in Cleveland in the wake of a U.S. District Court-ordered takeover by the State of the administration of the Cleveland City School District. The 1999 Program is, as was the 1995 Program, applicable to students residing in the District. The Program has two components, a scholarship program to enable students to attend "alternative schools" ("Scholarship Program" or "Voucher Program") and a tutorial program for children attending the Cleveland Public Schools ("Tutorial Program").

Private schools within the geographic boundaries of the City of Cleveland School District and public schools adjacent to the District are eligible to participate in the Scholarship Program as "alternative schools." In order to do so, private schools must register with the State Superintendent. Recipients are chosen by lot and receive a fixed percentage of the tuition charged the alternative school of their choice up to $2,500. Students whose family income is not more than 200% of the federally-established poverty level receive 90% of their school tuition; other scholarship recipients whose family income is above this threshold receive 75% of their tuition. Participating students may first enroll in the program as early as when the enter kindergarten and must do so by third grade. Once admitted to the program, they are eligible for scholarships through eighth grade. Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipient;

thereafter, the parents must endorse the check to the school. The State places no restriction on how the private school may utilize the money. In the event that an adjacent public school is involved, the State would issue a check made payable to the school district.

In the three years prior to the Ohio Supreme Court's holding the Voucher Programs unconstitutional, no public schools registered for the program. None have registered since the enactment of the Program in 1999. For the 1999-2000 school year, 3,801 students will be enrolled in the Program should an injunction not issue. Sixty percent of these students are from families at or below the poverty level. Fifty-six schools are registered to participate in the Program. The record in the prior litigation revealed that 80% of the schools participating in the 1995 program were sectarian and enrolled 85% of the students receiving scholarships. Some of the schools appear to have a pervasive religious orientation. One schools' informational literature contains the statement that "total religious instruction is the major focus of the educational program.... Lessons learned in formal religious classes are purposefully carried over into all subject areas." *See* Complaint in Case No. 1:99CV1740, Attachment B. Another provides in its Parent Handbook: "a child needs to hear and learn the word of God constantly, and [t]his can be done only when the entire curriculum and the life of the school is grounded in the word of God and dedicated to the purpose of showing the love of the Savior to a world which without Him, would be lost forever." *Id.*

Tutorial grants may be used to obtain tutorial services for students enrolled in the Cleveland Public Schools. The same number of scholarship and tutorial grants must be awarded in a given year. The eligibility criteria for the scholarship and the tutorial grants are the same. The maximum allowable tutorial grant is $500.

The Plaintiffs in these cases maintain that the Ohio Pilot Program is not distinguishable in any pertinent respect from a New York State assistance program struck down by the United States Supreme Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Defendants contend that because the Ohio Supreme Court previously addressed the issue of the constitutionality of the statute finding it did not violate the Establishment Clause, the doctrine of *res judicata* precludes the Plaintiffs from relitigating this issue. Moreover, they maintain that even if *res judicata* is not appropriate, this Court should defer in its ruling to the Ohio Supreme Court determination of the issue. They also argue that *Nyquist* does not require the enjoining of the Ohio Program because it differs in significant respects from the Program stricken down in *Nyquist*. Alternatively, Defendants argue that this Court should not follow *Nyquist* even if it were to be found controlling because subsequent Supreme Court cases interpreting the Establishment Clause have undermined its vitality.

For the reasons stated herein, Plaintiff's Motion for a Preliminary Injunction is granted.

II. *PRELIMINARY INJUNCTION CRITERIA*

The following four factors must be considered and balanced in deciding whether to issue a preliminary injunction: (1) whether the moving party is likely to succeed on the merits; (2) whether the moving party would suffer an irreparable injury if the preliminary injunction is not granted; (3) whether a preliminary injunction would cause substantial harm to others; and (4) whether a preliminary injunction would be in the public interest. *G&V Lounge, Inc. v.*

Michigan Liquor Control Com'n, 23 F.3d 1071, 1076 (6th Cir. 1994).

The violation of a First Amendment right constitutes irreparable injury. *Id.* at 1078-79. Furthermore, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 1079. While harm to others is also an important criteria, the weight to be given this factor turns not only on the gravity of the harm but on how the issue of likelihood of success is resolved. The greater the likelihood of success on the merits by Plaintiffs, the less weight should be given this factor. On the other hand, the lesser Plaintiffs' likelihood of success on the merits, the more weight should be given this factor. The Court shall discuss each of the four factors in turn and appropriately balance them to determine whether a preliminary injunction should issue.

A. *Do Plaintiffs Have a Likelihood of Success on the Merits?*

1. *Does Res Judicata Preclude the Relitigation of This Constitutional Challenge to the Voucher Program?*

Defendants argue that Plaintiffs are not likely to succeed on the merits in this case because they are precluded on *res judicata* grounds from litigating the constitutionality of the 1999 Scholarship Program by the decision of the Ohio Supreme Court in *Simmons v. Goff*, 711 N.E.2d 203 (Ohio 1999), finding that the 1995 Program was not in violation of the Establishment Clause. They also argue in the alternative that even if *res judicata* does not apply, the Ohio Supreme Court opinion is well reasoned, entitled to some deference by this Court, and demonstrates that Plaintiffs are not likely to succeed on the merits in this case. Plaintiffs concede that

they would be precluded by the doctrine of collateral estoppel if the decision of the constitutional issue by the Ohio Supreme Court in *Simmons v. Goff* had been necessary to the Court's decision in that case. They argue such decision was not necessary as the Court struck down the statute on state law grounds, finding the 1995 Program in violation of the one-subject bill. Plaintiffs content that the Court's decision regarding the First Amendment was dicta, and thus not essential to its holding. Consequently, because the Court's decision rested on an adequate and independent state ground, *see Lambrix v. Singletary*, 520 U.S. 518, 522-24 (1997), Plaintiffs were precluded from seeking an appeal pursuant to 28 U.S.C. § 1257 on the constitutional issue before the Ohio Supreme Court.

In *Migra v. Warren City School Dist. Board*, 465 U.S. 75, 78 (1984), the Supreme Court held that ordinarily a state court judgment would have the same preclusive effect in federal court as that judgment would have in state courts. This result is required by 28 U.S.C. § 1738 which provides that judgments of a state court "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in such state ... from which they are taken." The Court also clarified the terminology of preclusion, stating:

> The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." (Citations omitted). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion."

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. See *id.*, Introductory Note before § 24. *Id.* at 77, footnote 1.

The Court further stated that claim preclusion is sometimes simply referred to as *res judicata*, which can be confusing when the "doctrine" of *res judicata* is viewed as encompassing both issue and claim preclusion. In this discussion herein, collateral estoppel will be used to mean issue preclusion and *res judicata* will be used to mean claim preclusion.

Defendants use claim issue and claim preclusion in the alternative. Based on the information before the Court at this time, issue preclusion or collateral estoppel is most applicable. Defendants maintain that this issue was already decided by the Ohio Supreme Court and cannot be relitigated. Under the holding in *Migra*, the Court must determine this issue under the Ohio law of preclusion. Under Ohio law, a "prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 985 (Ohio 1983). This is consistent with the Restatement (Second) of Judgments § 27, which states:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Comment (h) to that Section further explains:

> [i]f issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

Applying the applicable principles of issue preclusion, this Court finds that doctrine is not likely to serve as a bar to Plaintiffs pursuing their Establishment Clause claims on the merits.

The Court assumes, as the Plaintiffs have conceded, that for purposes of this motion, they were parties to the prior litigation and would be bound, assuming all other conditions of the doctrine of collateral estoppel have been met. The Court finds that not all of the other conditions have been met. While the Court finds that Defendants had a full and fair opportunity to litigate the Establishment Clause issue before the Ohio Supreme Court, having briefed and argued this issue

there as well as before the Ohio Court of Appeals, the determination of the Establishment Clause issue was not essential to the judgment in *Simmons*. Plaintiffs' argument is well taken that the judgment of the Ohio Supreme Court could be fully supported by the state law ground on which the Ohio Supreme Court relied—that the Legislature passed the law in violation of the one-subject bill. This argument is made more compelling by the fact that Plaintiffs could not seek appeal to the U.S. Supreme Court on the federal constitutional issue. The Supreme Court does not entertain appeals from final judgments which rest on federal and state grounds where the state law ground alone is sufficient to uphold the judgment. Since its decision could have no effect on the judgment, it would be meaningless for the Court to hear such an appeal. For these reasons, the Court finds that collateral estoppel does not serve to preclude Plaintiffs from relitigating their Establishment Clause claim here

The Court will consider the Ohio Supreme Court's opinion and the extent to which it may serve as persuasive authority for this Court on the Establishment Clause issue in the context of discussing the Establishment Clause issue itself.

2. *Does the Voucher Program Violate the Establishment Clause?*

The separation of church and state was of prime importance to some of the most influential founders and framers of the U.S. Constitution. This perhaps is the reason why the very First Amendment to the U.S. Constitution addresses freedom of religion. It states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The concerns of the founders and framers were born out of both personal conviction regarding the evils which could attend state-

sponsored religion or government interference with religion and also out of their personal experiences. *See Everson v. Board of Education*, 330 U.S. 1 (1947); *id.* at 28 (Rutledge, J. dissenting); *see also Nyquist*, 413 U.S. at 760; *Strout v. Albanese*, 178 F.3d 57, 61 (1999) and sources cited therein. Ultimately, this provision was made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

As the Supreme Court said in *Committee for Public Education and Liberty v. Nyquist*, 413 U.S. 756 (1973), "cases arising under these clauses [the free exercise and establishment clauses] have presented some of the most perplexing questions to come before this Court." However, as the Court said, "[i]t has never been possible or desirable to enforce a regime of total separation..." *Id.* at 775. The Supreme Court has "recognize[d] that sectarian schools perform secular, educational functions as well as religious functions, and that forms of aid may be channeled to the secular without providing direct aid to the sectarian." *Nyquist*, 413 U.S. at 775. It is now clearly established that not every law which confers a benefit on a religious institution violates the Constitution. Some which confer only "indirect," "remote" or "incidental benefits" have been found to be constitutional. *See, e.g., Everson*, 330 U.S. 1. Nevertheless, line drawing in actual cases has been difficult.

The Court has approved tax deductions for the costs of bus transportation by students, regardless of whether they attended public or private school, including parochial schools. *Everson*, 330 U.S. 1. The Court has approved the provision of textbooks at parochial schools when textbooks were not provided to students on the basis of whether they attended public or private school. *Board of Education v. Allen*, 392 U.S. 236 (1968). Until recently, the Court held that public employees could not provide instruction in secular

subjects, such as giving remedial and accelerated instruction on the premises of religious institutions. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Meek v. Pittinger*, 421 U.S. 349 (1975). However, the Court has recently reversed itself on this issue. *Agostini v. Felton*, 521 U.S. 203 (1997).

The Court has generally held that a government cannot provide for scholarship assistance to students which supports religious instruction or indoctrination. *Nyquist*, 413 U.S. 756. However, it has approved of scholarship assistance where the aid to students is provided as part of a program made generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools to be benefitted. According to the Court, in such instances, the choice of the scholarship recipient of what school to attend is not affected by the aid given. *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986).

In order for legislation providing aid to a religious institution to pass constitutional muster, it must meet a three-part test employed by the Court: (1) it must reflect a secular legislative purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive entanglements with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The question to be determined in this case is whether the aid provided under the Cleveland Pilot Scholarship Program, which is not limited to financing secular instruction, is constitutional under *Lemon* and the applicable Supreme Court precedents.

a. *Nyquist*

The Court will now examine *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in an effort to determine whether it should serve as precedent for this case.

In *Nyquist*, New York created a two-part program to partially defray costs to educating low-income students who attended private schools. *Id.* at 762-67. The first part of the program provided partial tuition reimbursement grants to the low-income parents whose children attended private schools, including religious schools. The second part gave some limited state income tax relief to parents who did not qualify for reimbursement grants. *Id.* at 764.

In *Nyquist*, the State of New York established a tuition reimbursement program for parents of children attending elementary or secondary nonpublic schools. The reimbursement was limited to $50 for each grade school child and $100 for each high school child. To qualify for reimbursement for this program, a parent had to have an annual taxable income of less than $5,000. In order to receive payment, a parent was required to submit a verified statement to the Commissioner of Education containing a receipted tuition bill. State reimbursements could not exceed 50% of that amount. *Id.* at 764.

Approximately 85% of the 2,000 nonpublic schools in New York State were church affiliated. Some of the institutions which could qualify for the program imposed religious restrictions of various types, such as requiring students to attend religious activities and to receive instruction in and obey the theology of the school imposing the restrictions. *Id.* at 767-768.

The Supreme Court found that the tuition reimbursement program, "designed to allow direct, unrestricted grants of $50 to $100 per child ... as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation," to be violative of the Establishment Clause of the First Amendment. *Id.* at 780. The Court noted that there was no doubt that such grants could not "be given directly to sectarian schools..." *Id.* The Court further stated "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.*

The Defendants in *Nyquist* argued that the State of New York's tuition reimbursement program was similar to programs upheld by the Court in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 382 U.S. 236 (1968). In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools. The *Allen* Court upheld the furnishing of text books directly to children who attended parochial schools. The Court rejected Defendants' argument that the *Nyquist* program should be upheld because, like *Everson* and *Allen*, the grants in *Nyquist* went to parents and not to the schools. The Court indicated that this was only one of many factors to be considered in determining whether or not the Establishment Clause was violated. Further, it explained that the programs upheld in *Everson* and *Allen* were significantly different from the nature of the tuition grants involved in the *Nyquist* case.

> In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection,

> sewage disposal, highways, and sidewalks for parochial schools. 330 U.S., at 17-18, 67 S.Ct., at 512-513. Such services, *782 provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' *id.*, at 18, 67 S.Ct., at 513 that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principal. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. *Id.* at 781-782.

The Court found that the tuition grants involved in *Nyquist* were not restricted to supporting secular educational functions. *Id.* at 783. The Court indicated that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783. The Court went on to further state that "if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions." *Id.* at 786. It then included the following in a footnote, the language of which has been often quoted in subsequent Establishment Clause cases decided by the Court:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally

> without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman v. Essex*, 342 F.Supp. 399, 412-413 (SD Ohio), aff'd, 409 U.S. 808, 93 S.Ct. 61, 34 L.Ed.2d 69 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill,' 38 U.S.C. § 1651, impermissibly advances religion in violation of the Establishment Clause. See also n. 32, supra.

Defendants assert that the Program in this case can be distinguished from the program struck down in *Nyquist* because the purpose of the 1999 Voucher Program is to give low-income students in a severely distressed school district the option to attend private schools at taxpayer expense, whereas the program struck down in *Nyquist* was designed to provide a special benefit to sectarian schools.

A review of the purposes of the two programs reveals that any differences which exist between them are not sufficient to distinguish them on constitutional grounds. The articulated legislative purpose in *Nyquist* for the tuition reimbursement program was to ensure a pluralistic society, promote competitive and diverse alternatives to public education and ensure low-income students not be denied those opportunities, and to make sure there was no precipitous decline in nonpublic school enrollment which would aggravate an existing crisis in public education, thereby jeopardizing education for all children. *Nyquist*, 413 U.S. at 765. In order to qualify for the grants, a parent had to have an annual taxable income of less than $5,000 and grants were limited to the modest amount of $50 for each grade school child and $100 for each high school child. The court in *Nyquist* found the stated reasons for the program sufficient

to meet the secular purpose test of *Lemon*. There is no question in this case that the articulated purpose of the Cleveland Pilot Program meets this test as well. Similar to *Nyquist*, the Program seeks to provide nonpublic school alternatives primarily to low-income students for acceptable reasons.

Thus, the question in each case is, "Does the program under review have the effect of advancing religion?" The Court in *Nyquist* found the program at issue in that case had this effect because the program provided unrestricted grants to parents as tuition reimbursement for their children to attend "nonpublic schools, the bulk of which is concededly sectarian in orientation." *Nyquist*, 413 U.S. at 780. The Court reached this conclusion even in the face of a statute that made grants available to attend private schools, not just sectarian schools. A similar circumstance exists in the instant case; the grants are available by statute to attend registered private schools, including religious schools, as well as any participating adjacent public schools. Since *Nyquist* took account of the reality that an overwhelming majority of the schools at which students can utilize their grants were sectarian, it would seem appropriate that the Court should assess the reality of the opportunities available to students in this case.

In this case, Defendants concede that the overwhelming majority of schools from which a student may choose are sectarian and that no adjacent public school has chosen to participate in the Program. Also, as in *Nyquist*, the funds received by a school are not restricted to use for secular educational purposes. In all pertinent respects, the Program looks like *Nyquist* and would appear to be controlled by the precedent.

Nyquist has not been overruled. If *Nyquist* is precedent which is directly on point, this Court is constrained to follow it. As the Supreme Court recently stated in *Agostini v. Felton*, 521 U.S. 203 (1997), in deciding to overrule one of its own precedents:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent to this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Nevertheless, the Court will explore whether or not *Nyquist* has been undermined by subsequent Supreme Court cases and/or whether recent cases suggest there is a meaningful distinction between the program stricken down in *Nyquist* and that which is being challenged in this case. Defendants cite several cases in support of their position that *Nyquist* has been undermined and should not be followed and that the Cleveland Pilot Program can be meaningfully distinguished, most notably by *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Dept. of Serv. For the Blind*, 474 U.S. 481 (1986), *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) and *Agostini v. Felton*, 521 U.S. 203 (1997). The Court will discuss each of those cases in turn.

b. Post-Nyquist Cases

(i) *Mueller.*

In *Mueller v. Allen*, 463 U.S. 388 (1983), the U.S. Supreme Court upheld the constitutionality of a Minnesota statute which allowed state taxpayers to deduct, when computing their state income tax, certain tuition, transportation and educational expenses actually incurred in sending their children to elementary or secondary schools. It found that the program complied with each of the three parts of the *Lemon* test. The court determined that the program had a secular legislative purpose, stating:

> A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian. By educating a substantial number of students such school relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. *Id.* at 395.

The Court also concluded the program did not have the primary effect of advancing religion. The Court noted that the tax deduction was one of many provided under the Minnesota tax laws and that their "decisions consistently have recognized that traditionally '[l]egislatures have broad latitude in creating classifications and distinctions in tax statutes,' *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983)...." *Id.* at 396.

The Court found it especially significant that the deduction was available for education expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools or sectarian private schools. *Id.* at 397. The Court found this aspect of the statute, as well as others, to be "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398. The Court recounted that in striking down the New York statute, it had noted the difference between that statute and those involved in *Everson*, providing a tax deduction to the parents for the bus fare of all children who attended school, whether public or private and *Allen*, which provided textbooks for secular subjects to all children, regardless of whether they attended public or private school. *Id.* The Court found the tax deduction involved to be more like the type of program discussed in footnote 38 of *Nyquist*, wherein the Court "intimated that 'public assistance (e.g., scholarships) made available generally without regard to the sectarian, nonsectarian, or public, nonpublic nature of the institution benefited,' (citation omitted) might not offend the Establishment Clause." *Id.*

While acknowledging that "financial assistance provided to parents ultimately has an economic effect comparable to aid given directly to the schools attended by

their children," the Court found it important that the assistance to parochial schools was channeled through parents rather than directly provided to parochial schools. *Id.* at 399. "[U]nder Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children." *Id.*

As discussed above, the Supreme Court in *Mueller* clearly did not see itself as undermining *Nyquist*; it took pains to distinguish it. Defendants argue that they, nevertheless, comply with the dictates of *Mueller* and footnote 38 of *Nyquist*. They maintain they have devised a neutral program made generally available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted. They further argue that any benefit received by a sectarian institution is received as a result of the private choice of the individual parents. The Defendants also argue that this Court should not consider the number of parochial schools involved in the Program as evidence of an Establishment clause violation because the Court in *Mueller* indicated it would not consider the extent to which nonsectarian schools might benefit by the tax deduction provided there by comparison to other institutions.

On analysis, the Court finds the Program at issue distinguishable in at least two pertinent respects from *Mueller*. First, under the Cleveland Pilot Program, parents and their children do not have a significant choice between public and private school. No adjacent public school participates in the Program. Parents and their children do not have a significant choice between parochial and non-parochial schools; among registered schools, parochial schools overwhelmingly predominate. This Program is unlike the tax program in *Mueller* where parents and children could make an independent choice between public and private schools, including religious schools, and where

parents received a tax deduction for expenses associated with attendance at either. Second, while it is pertinent to consider the extent to which the money flowing to a sectarian institution is as a result of the private choice of parents, the nature of the parental choice is not sufficient here to break the nexus between the state and the religious institution. As stated earlier, under the Program, the overwhelmingly majority of participating schools are religious in nature. The choice is unlike that in *Mueller* where the program was found to be neutral and made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted. Furthermore, any aid received by a religious institution as the result of a tax benefit claimed by parents is by its very nature more attenuated than the benefits conferred under the Cleveland Plan, where benefits are conferred to specifically pay tuition.

Moreover, contrary to Defendants' assertions, *Mueller* cannot be fairly read as repudiating the obligation of the Courts in the first instance to see whether the state program is indeed genuinely neutral and made available without regard to the parochial, non-parochial or private, non-private nature of its beneficiaries. *Mueller* holds that if a court finds that the above requirements have been met, it will not find that the Establishment Clause has been violated on statistical evidence that citizens have exercised their private choices in ways that benefit sectarian institutions more than nonsectarian institutions. Over the dissent of Justices Marshall, Brennan, Blackmun and Stevens, the Court found, on analysis, that the program met these criteria. Having reached this conclusion, it indicated it would not bottom constitutionality on a determination of the extent to which sectarian or nonsectarian schools were the actual beneficiaries. *Id.* at 409.

(i) *Witters.*

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Supreme Court upheld the constitutionality of a State of Washington program extending vocational rehabilitation assistance to a blind person to attend a Christian college to become a pastor, missionary or youth director. In regard to the first part of the *Lemon* test, whether the program served a secular purpose, the court stated:

> Our analysis relating to the first prong of that test is simple: all parties concede the unmistakably secular purpose of the Washington program. That program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services, and no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education. *Id.* at 485-486.

In addressing the effects program of the test, the Court cited *Nyquist* as a case where the effect of the aid given resulted in an impermissible direct subsidy by the state to the religious school, even though it was in the form of aid to the students or their parents. *Id.* at 487. It found, however, that the vocational assistance program at issue did not amount to a direct subsidy. *Id.* at 488. The Court concluded:

> that "the vocational assistance provided ... is paid directly to the student, who transmits it to the educational institution of his or her choice." Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result

> of the genuinely independent and private choices of aid recipients." *Id.*

To clearly distinguish this case from the program involved in *Nyquist*, the Court cited to footnote 38 of *Nyquist* stating, "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.' *Committee for Public Education & Liberty v. Nyquist*, 413 U.S. at 782-783, n. 38...." *Id.* at 488. It noted that it neither gives greater benefits to those who attend religious institutions, "nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions." *Id.* Students could expend their education grants on wholly secular education if they wished to and could choose from "a huge variety of possible careers, of which only a small handful are sectarian." *Id.* Furthermore, the Court found that "[a] program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy." *Id.* For these reasons and others discussed by the Court, it found the link between state and the religious institution to be attenuated. *Id.*

A review of *Witters* demonstrates that it did not view itself as departing from *Nyquist* or undermining it, but rather as approving of the type of scholarship which the *Nyquist* Court said in footnote 38 of its opinion it had no occasion to consider. Indeed, the *Witters* Court distinguished the program at issue in that case from the one in *Nyquist*.

While the program did make scholarship aid available to a student which could be directly applied to pursue a religious career at a religious institution, critical differences exist between that case and this one. In *Witters*, the Court found, unlike the situation in *Nyquist*, the student had a genuine choice between sectarian and nonsectarian and

between public and nonpublic institutions. Indeed, he had a choice between pursuing religious and non-religious vocations. Because he could utilize the aid however he chose, the provision of the scholarship would have no effect on his choice of an institution. Though a religious institution might benefit, it would be only as a direct result of the choice of the student, not as the result of the state providing a benefit to religious institutions. Contrarily, under the Cleveland Scholarship Program, clearly the provision of the scholarship has an effect on parental and student choice because the overwhelming majority of participating schools are religious in nature.

(ii) *Zobrest.*

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Supreme Court held that providing the services of an interpreter to a deaf student attending a Catholic high school pursuant to the Individual With Disabilities Education Act (IDEA), 20 U.S.C. § 1407 *et seq.*, and its Arizona counterpart did not violate the Establishment Clause. The student had previously attended public school where he was furnished such an interpreter. Relying heavily on *Mueller*, *Witters* and footnote 38 of the *Nyquist* opinion, the Court found that the effect of the government program was not to promote religion. *Id.* at 10.

> By awarding parents freedom to select a school of their choice, the statute insures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state

> decisionmaking.... When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed toward religion; *Witters*, *supra*, at 488, ... it follows under our prior decisions that provision of that service does not offend the Establishment Clause. *Id.*

The Court found the case to be easier than *Mueller* and *Witters* because no state monies that were traceable to the government went to religious institutions. *Id.* In reaching its decision, the Court rejected the argument that because the provision of services provided by the state took place on the premises of the religious institution, the program had the primary effect of supporting religion. The Court distinguished this case from *Meek v. Pittinger*, 421 U.S. 349 (1975), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). In *Zobrest*, the Court described the statute struck down in *Meek* as providing "'massive aid' to private schools—more than 75% of which were church related—through a direct loan of teaching material and equipment (citation omitted)." *Id.* at 11. The program also provided for the use of state personnel to provide 'auxiliary services', including counseling and remedial and accelerated instruction. *Id.* The program involved in *Ball* also included the provision of services on the premises of the private school, the teaching of classes in buildings at the institution.

The Court found the program in *Zobrest* to be distinguishable from those in *Meek* and *Ball* in two important respects. First, the direct grants of aid by the government in those two cases "relieved sectarian schools of costs they would otherwise have borne in educating their students." *Id.* (citation omitted). The Court determined the result in *Zobrest* to be otherwise, concluding that the school in that case would not be relieved of any such expenses; any benefit

it received was attenuated and was the result of the private choice of parents. *Id.*

Second, the Court found "the task of a sign interpreter [to be]—quite different from that of a teacher or guidance counsel," *id.* at 13, and concluded that there was nothing to suggest that the interpreter could other than interpret the materials being presented to the class. *Id.*

There is nothing in the *Zobrest* opinion which can be read as undermining *Nyquist*. The furnishing of a sign interpreter did not place any money in the coffers of a religious institution. This was also a program made available to students without regard to where they attended school. It was in no way skewed toward religion. Therefore, it could not be said that the provision of service had an effect on the parent's choice of an educational institution. Any incidental benefit received by the school occurred only as the result of parental choice. Furthermore, the sign interpreter would not be introducing religious content into the school but would have the responsibility for neutrally interpreting regular classes at school. For all of these reasons, the Cleveland Program is distinguishable from that in *Zobrest*.

(iii) *Agostini*.

The most recent case which sheds some light on the question involved herein is *Agostini v. Felton*, 521 U.S. 203 (1997). In that case, the Supreme Court overruled its prior decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), that the Establishment Clause barred New York City from sending public school teachers into parochial schools to provide remedial education to disadvantaged children under a congressionally mandated program, Title I of the Elementary and Secondary Education Act of 1965. As a result of the Court's ruling in *Aguilar*, New York was required to spend

an average of $15 million in additional costs to provide the necessary services to eligible students attending private schools, including costs for leasing a site, mobile instructional units and for transportation costs to get the students to and from the site. *Agostini*, 521 U.S. at 213.

In addressing whether the Title I program violated the Establishment Clause, the Court reviewed its reasoning in *Aguilar* and its companion case *Ball*, which involved programs implemented by the City of Grand Rapids, Michigan, where nonpublic school students were taught supplemental courses by public school teachers during the regular school day on the premises of the nonpublic school. *Id.* at 218-222. The Court then concluded that the assumptions on which *Aguilar* and *Ball* had relied had been undermined by more recent Supreme Court cases. *Id.* The Court indicated, however, that the basic principles of Establishment Clause jurisprudence had not changed. The Court then explained its current approach.

In evaluating whether the Establishment Clause is violated, it is still pertinent to inquire whether the program has a secular purpose and the inquiry to reach this determination has not changed. It is also still pertinent to inquire whether the aid has the effect of advancing religion. The Court stated "[w]hat has changed ... is our underestimating of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. This understanding had changed in two significant ways. First, the Court found that in cases decided subsequent to *Meek* and *Ball*, such as *Zobrest*, it had rejected the presumption in those cases "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* It concluded that just as it saw no reason to presume that the language

interpreted in *Zobrest* would use that position to inculcate religion, it saw no reason to assume that other employees would do so. *Id.* at 225.

Second, citing *Witters*, the Court indicated that it had departed from the rule "that all government aid which directly aids the educational future of religious schools is invalid." *Id.* The cases where departure is warranted are those in conformity with the requirements discussed in footnote 38 of *Nyquist*, as demonstrated by *Witters*: grants which are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.* at 225. As the court stated in *Witters*, money goes to religious institutions as a result of a "'genuinely independent and private choice of individuals.'" *Id.* at 226 (citation omitted).

The Court does not find that the *Agostini* case undermines the vitality of *Nyquist* either. Even while reversing its prior decision in *Aguilar* so that Title I services could be provided to students on the grounds of religious institutions, it simply allowed students attending parochial schools to obtain remedial educational benefits which were made generally available to qualifying students without regard to the nature of the institution attended. The provision of services would have no effect on a student's choice of what school to attend. In one sense, it is like providing textbooks in math or science to all students regardless of the school they attend. Indeed, no monies went into the coffers of the religious institution and there clearly was no direct support for religious institutions. The *Agostini* Court, while acknowledging that it no longer applied an absolute rule that all direct aid which supports religious institutions was barred by the Establishment Clause, noted that the circumstances where such aid had been found permissible was in the context of cases like *Witters*, a class of cases which *Nyquist* did not address. On comparison of the Scholarship Program in this case with the program involved in *Agostini*, the Court concludes that the cases are significantly different. In this case, unlike in *Agostini*, monies would go directly to support the regular educational program of a religious institution including, in some cases, religious instruction. Moreover, as stated earlier, the provision of the services under the Cleveland Program would impact whether a person chose a religious institution, whereas they did not in *Agostini*.

For the reasons stated above, the Court does not find the Supreme Court of Ohio's opinion persuasive on the Establishment Clause issue.

B. *Will Plaintiffs Suffer Irreparable Harm?*

Because the Court concludes that Plaintiffs have a strong likelihood of success on the merits, it finds also that there is a substantial likelihood that they will suffer irreparable harm.

C. *Will Others Suffer Substantial Harm?*

The parties stipulated that testimony might be presented by way of affidavits including a large number submitted by the Defendants and Intervenors attesting to the harm which the children and others might suffer if the Program is enjoined. Among the affidavits were those of children, parents, principals and administrators of registered schools and a panel of psychiatrists who interviewed selected school children and their families to assess the harm which might be caused to them. Affidavits of professors of psychology, education and public administration were supplied, including an affidavit from Robert Coles, M.D., a professor of psychiatry in medical humanities at Harvard Medical School.

In some of the affidavits, the professionals spell out the various types of harm which children may suffer when their lives are disrupted. They lose friendships and sometimes a sense of continuity of purpose. Students might suffer a sense of loss of security and stability, depending on their family circumstances. Also, their emotional, social and personal development could be severely disrupted. The parents, principals and administrators, teachers and students attest to the positive role that the alternative schools have played in their lives.

The Court credits the testimony regarding potential harm to the students caused by disruption of the Program, but finds that it is insufficient to overcome the fact that Plaintiffs' likelihood of success on the merits is great.

D. *Is the Granting of an Injunction in the Public Interest?*

Because the Court finds that Plaintiffs have a substantial likelihood of success on the merits, it finds that it is substantially in the public interest to grant an injunction.

III. *CONCLUSION*

On thoroughly reviewing and balancing all of the necessary factors, the court concludes that the Cleveland Pilot Scholarship Program should be enjoined. Though Defendants have amassed substantial support regarding the harm the children who will not be able to pursue the Program and others will suffer, that harm cannot be dispositive where the Court concludes that there is no substantial possibility that it will ultimately conclude in their favor. Indeed, the Court has concluded that Plaintiffs have a very substantial chance of succeeding on the merits. The Cleveland Program

does not make aid available without regard to the nature of the schools to be benefitted. The participating schools are overwhelmingly sectarian. This means that parents cannot make an educational choice without regard to whether the school is parochial or not. Therefore, the Cleveland Program has the primary effect of advancing religion. Failing to grant the injunction under such circumstances would not only be contrary to law, but could cause an even greater harm to the children by setting them up for greater disruption at a later time. Therefore, the injunction is granted and the Defendants are enjoined from instituting or continuing to administer this Program pending the outcome of a decision on the merits in this case.

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix G

00-3055/3060/3063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORIS SIMMONS-HARRIS, ET AL.	)	
Plaintiffs-Appellees,	)	ORDER
v.	)	
SUSAN TAVE ZELMAN, SUPERINTENDANT OF PUBLIC INSTRUCTION, STATE OF OHIO, ET AL.,	)	[Filed: Feb. 28, 2001]
Defendants-Appellants (00-3055/3060),	)	
SENEL HERMAN TAYLOR, ET AL.,	)	
Intervenors-Defendants-Appellants (00-3055),	)	
HANNA PERKINS SCHOOL, ET AL.,	)	
Intervenors-Defendants-Appellants (00-3063).	)	

BEFORE: RYAN, SILER, and CLAY, Circuit Judges.

The court having received three petitions for rehearing with the suggestion for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active* judges of the court, and less than a majority of the judges having favored the suggestions, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Judge Moore recused herself from participation in this ruling.

Appendix H

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.974 (Anderson 1999)

§3313.974 Definitions.

As used in this section and in sections 3313.975 [3313.97.5] to 3313.979 [3313.97.9] of the Revised Code:

(A) "Individualized education program" and "handicapped child" have the same meanings as in section 3323.01 of the Revised Code.

(B) "Mainstreamed handicapped student" means a handicapped child who has an individualized education program providing for the student to spend more than half of each school day in a regular school setting with nonhandicapped students.

(C) "Separately educated handicapped student" means a handicapped child who has an individualized education program providing for the student to spend at least half of each school day in a class or setting separated from nonhandicapped students.

(D) "Low-income family" means a family whose income is below the level which the superintendent of public instruction shall establish.

(E) "Parent" has the same meaning as in section 3313.98 of the Revised Code.

(F) "Registered private school" means a school registered with the superintendent of public instruction pursuant to section 3313.976 [3313.97.6] of the Revised Code.

(G) "Alternative school" means a registered private school located in a school district or a public school located in an adjacent school district.

(H) "Tutorial assistance" means instructional services provided to a student outside of regular school hours approved by the commission on school choice pursuant to section 3313.976 [3313.97.6] of the Revised Code.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix I

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.975 (Anderson 1999)

§3313.975 Pilot project scholarship program established.

As used in this section and in sections 3313.975 [3313.97.5] to 3313.979 [3313.97.9] of the Revised Code, "the pilot project school district" or "the district" means any school district included in the pilot project scholarship program pursuant to this section.

(A) The superintendent of public instruction shall establish a pilot project scholarship program and shall include in such program any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent. The program shall provide for a number of students residing in any such district to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school in any such district.

(B) The state superintendent shall establish an application process and deadline for accepting applications from students residing in the district to participate in the scholarship program. In the initial year of the program students may only use a scholarship to attend school in grades kindergarten through third.

The state superintendent shall award as many scholarships and tutorial assistance grants as can be funded given the amount appropriated for the program. In no case, however, shall more than fifty per cent of all scholarships awarded be used by students who were enrolled in a nonpublic school during the school year of application for a scholarship.

(C)(1) The pilot project program shall continue in effect each year that the general assembly has appropriated sufficient money to fund scholarships and tutorial assistance grants. In each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three. However, any student who has received a scholarship the preceding year may continue to receive one until the student has completed grade eight.

(2) If the general assembly discontinues the scholarship program, all students who are attending an alternative school under the pilot project shall be entitled to continued admittance to that specific school through all grades up to the eighth grade that are provided in such school, under the same conditions as when they were participating in the pilot project. The state superintendent shall continue to make scholarship payments in accordance with division (A) or (B) of section 3313.979 [3313.97.9] of the Revised Code for students who remain enrolled in an alternative school under this provision in any year that funds have been appropriated for this purpose.

If funds are not appropriated, the tuition charged to the parents of a student who remains enrolled in an alternative school under this provision shall not be increased beyond the amount equal to the amount of the scholarship plus any additional amount charged that student's parent in the most recent year of attendance as a participant in the pilot

project, except that tuition for all the students enrolled in such school may be increased by the same percentage.

(D) Notwithstanding sections 124.39, 3307.35, and 3319.17 of the Revised Code, if the pilot project school district experiences a decrease in enrollment due to participation in a state-sponsored scholarship program pursuant to sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code, the district board of education may enter into an agreement with any teacher it employs to provide to that teacher severance pay or early retirement incentives, or both, if the teacher agrees to terminate the employment contract with the district board, provided any collective bargaining agreement in force pursuant to Chapter 4117. of the Revised Code does not prohibit such an agreement for termination of a teacher's employment contract.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix J

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.976 (Anderson 1999)

§3313.976 Eligibility of private schools and public schools in adjacent districts; tutorial assistance.

(A) No private school may receive scholarship payments from parents pursuant to section 3313.979 [3313.97.9] of the Revised Code until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:

(1) The school is located within the boundaries of the pilot project school district;

(2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program specified under sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code, including, but not limited to, the requirements for admitting students pursuant to section 3313.977 [3313.97.7] of the Revised Code;

(3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;

(4) The school does not discriminate on the basis of race, religion, or ethnic background;

(5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;

(6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;

(7) The school does not provide false or misleading information about the school to parents, students, or the general public;

(8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount established pursuant to division (C)(1) of section 3313.978 [3313.97.8] of the Revised Code, excluding any increase described in division (C)(2) of that section. The school shall permit any such tuition, at the discretion of the parent, to be satisfied by the low-income family's provision of in-kind contributions or services.

(B) The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section.

(C) Any public school located in a school district adjacent to the pilot project district may receive scholarship payments on behalf of parents pursuant to section 3313.979 [3313.97.9] of the Revised Code if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the

district intends to admit students from the pilot project district for the ensuing school year pursuant to section 3327.06 of the Revised Code.

(D) Any parent wishing to purchase tutorial assistance from any person or governmental entity pursuant to the pilot project program under sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code shall apply to the state superintendent. The state superintendent shall approve providers who appear to possess the capability of furnishing the instructional services they are offering to provide.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix K

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.977 (Anderson 1999)

§3313.977 Admission of students to registered private school.

(A)(1) Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:

(a) Students who were enrolled in the school during the preceding year;

(b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;

(c) Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply prior to the fifteenth day of February prior to admission.

(d) All other applicants residing anywhere, provided that all remaining available spaces shall be filled from among such applicants by lot.

Children from low-income families not selected by lot under division (A)(1)(c) of this section shall be included in the lottery of all remaining applicants pursuant to division (A)(1)(d) of this section.

(2) Each registered private school shall first admit to grades four through eight students who were enrolled in the school during the preceding year. Any remaining spaces for students in these grades may be filled as determined by the school.

(B) Notwithstanding division (A) of this section, except where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicapped student.

(C) If a scholarship student who has been accepted in accordance with this section fails to enroll in the school for any reason or withdraws from the school during the school year for any reason, the school may elect to replace such student with another scholarship student only by first offering the admission to any low-income scholarship students who filed applications by the preceding fifteenth day of February and who were not accepted at that time due to space limitations.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix L

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.978 (Anderson 1999)

§3313.978 Implementation of program by state superintendent and school officials; scholarships and tutorial assistance grants.

(A) Annually by the first day of November, the superintendent of public instruction shall notify the pilot project school district of the number of initial scholarships that the state superintendent will be awarding in each of grades kindergarten through third.

The state superintendent shall provide information about the scholarship program to all students residing in the district, shall accept applications from any such students until such date as shall be established by the state superintendent as a deadline for applications, and shall establish criteria for the selection of students to receive scholarships from among all those applying prior to the deadline, which criteria shall give preference to students from low-income families. For each student selected, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the scholarship amount. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of

the scholarship amount. The state superintendent shall notify students of their selection prior to the fifteenth day of January and whether they qualify for seventy-five or ninety per cent of the scholarship amount.

(1) A student receiving a pilot project scholarship may utilize it at an alternative public school by notifying the district superintendent, at any time before the beginning of the school year, of the name of the public school in an adjacent school district to which the student has been accepted pursuant to section 3327.06 of the Revised Code.

(2) A student may decide to utilize a pilot project scholarship at a registered private school in the district if all of the following conditions are met:

(a) By the fifteenth day of February of the preceding school year, or at any time prior to the start of the school year, the parent makes an application on behalf of the student to a registered private school.

(b) The registered private school notifies the parent and the state superintendent as follows that the student has been admitted:

(i) By the fifteenth day of March of the preceding school year if the student filed an application by the fifteen day of February and was admitted by the school pursuant to division (A) of section 3313.977 [3313.97.7] of the Revised Code;

(ii) Within one week of the decision to admit the student if the student is admitted pursuant to division (C) of section 3313.977 [3313.07.7] of the Revised Code.

(c) The student actually enrolls in the registered private school to which the student was first admitted or in another registered private school in the district or in a public school in an adjacent school district.

(B) The state superintendent shall also award in any school year tutorial assistance grants to a number of students equal to the number of students who receive scholarships under division (A) of this section. Tutorial assistance grants shall be awarded solely to students who are enrolled in the public schools of the district in a grade level covered by the pilot project. Tutorial assistance grants may be used solely to obtain tutorial assistance from a provider approved pursuant to division (D) of section 3313.976 [3313.97.6] of the Revised Code.

All students wishing to obtain tutorial assistance grants shall make application to the state superintendent by the first day of the school year in which the assistance will be used. The state superintendent shall award assistance grants in accordance with criteria the superintendent shall establish. For each student awarded a grant, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the grant amount and so notify the student. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the grant amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the grant amount.

(C)(1) In the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient

attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.

(2) The state superintendent shall provide for an increase in the basic scholarship amount in the case of any student who is a mainstreamed handicapped student and shall further increase such amount in the case of any separately educated handicapped child. Such increases shall take into account the instruction, related services, and transportation costs of educating such students.

(3) In the case of tutorial assistance grants, the grant amount shall not exceed the lesser of the provider's actual charges for such assistance or a percentage established by the state superintendent, not to exceed twenty per cent, of the amount of the pilot project school district's average basic scholarship amount.

(4) No scholarship or tutorial assistance grant shall be awarded unless the state superintendent determines that twenty-five or ten per cent, as applicable, of the amount specified for such scholarship or grant pursuant to division (C)(1), (2), or (3) of this section will be furnished by a political subdivision, a private nonprofit or for profit entity, or another person. Only seventy-five or ninety per cent of such amounts, as applicable, shall be paid from state funds pursuant to section 3313.979 [3313.97.9] of the Revised Code.

(D)(1) Annually by the first day November, the state superintendent shall estimate the maximum per-pupil scholarship amounts for the ensuing school year. The state superintendent shall make this estimate available to the general public at the offices of the district board of education together with the forms required by division (D)(2) of this section.

(2) Annually by the fifteenth day of January, the chief administrator of each registered private school located in the pilot project district and the principal of each public school in such district shall complete a parental information form and forward it to the president of the board of education. The parental information form shall be prescribed by the department of education and shall provide information about the grade levels offered, the numbers of students, tuition amounts, proficiency examination results, and any sectarian or other organizational affiliations.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix M

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.979 (Anderson 1999)

§3313.979 Payment of scholarships and grants to parents or to school district; monthly reports by private school.

Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the parents of the student entitled to the scholarship or grant. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

(A)(1) By the fifteenth day of each month of the school year that any scholarship students are enrolled in a registered private school, the chief administrator of that school shall notify the state superintendent of:

(a) The number of students who were reported to the school district as having been admitted by that private school pursuant to division (A)(2)(b) of section 3313.978 [3313.97.8] of the Revised Code and who were still enrolled in the private school as of the first day of such month, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount;

(b) The number of students who were reported to the school district as having been admitted by another private school pursuant to division (A)(2)(b) of section 3313.978

[3313.97.8] of the Revised Code and since the date of admission have transferred to the school providing the notification under division (A)(1) of this section, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount.

(2) From time to time, the state superintendent shall make a payment to the parent of each student entitled to a scholarship. Each payment shall include for each student reported under division (A)(1) of this section, a portion of seventy-five or ninety per cent, as applicable, of the scholarship amount specified in divisions (C)(1) and (2) of section 3313.978 [3313.97.8] of the Revised Code. This amount shall be proportionately reduced in the case of any such student who is not enrolled in a registered private school for the entire school year.

(3) The first payment under this division shall be made by the last day of November and shall equal one-third of seventy-five or ninety per cent, as applicable, of the estimated total amount that will be due to the parent for the school year pursuant to division (A)(2) of this section.

(B) The state superintendent, on behalf of the parents of a scholarship student enrolled in a public school in an adjacent school district pursuant to section 3327.06 of the Revised Code, shall make the tuition payments required by that section to the school district admitting the student, except that, notwithstanding sections 3323.13, 3323.14, and 3327.06 of the Revised Code, the total payments in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the scholarship amount provided in divisions (C)(1) and (2) of section 3313.978 [3313.97.8] of the Revised Code.

(C) Whenever an approved provider provides tutorial assistance to a student, the state superintendent shall pay the parent for such costs upon receipt of a statement from the parent specifying the services provided and the costs of the services, which statement shall be signed by the provider. The total payments to any parent under this division for all provider services to any individual student in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the grant amount provided in division (C)(3) of section 3313.978 [3313.97.8] of the Revised Code.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix N

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.01 (Anderson 1998)

§3314.01 Permission to become community school; status and general powers of community school.

(A)(1) A board of education may permit all or part of any of the schools under its control, upon request of a proposing person or group and provided the person or group meets the requirements of this chapter, to become a community school.

(2) Any person or group of individuals may propose the creation of a community school pursuant to the provisions of this chapter. No nonpublic chartered or nonchartered school in existence on January 1, 1997, is eligible to become a community school under this chapter.

(B) A community school created under this chapter is a public school, independent of any school district, and is part of the state's program of education. A community school may sue and be sued, acquire facilities as needed, contract for any services necessary for the operation of the school, and enter into contracts with a sponsor pursuant to this chapter. The governing authority of a community school may carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, this chapter, other statutes applicable to community schools, and the contract entered into under this chapter establishing the school.

HISTORY: 147 v H 215 (Eff 6-30-97); 147 v S 55 Eff 7-1-98.

The effective date is set by section 6 of SB 55.

The provisions of §§ 50.39, 50.52, Subsection 2(B) paragraph 1 of HB 215 (147 v --) read as follows:

SECTION 50.39. By December 31, 2002, the Legislative Office of Education Oversight shall complete an evaluation of the assets and liabilities to the state's system of educational options that result from the establishment of community schools under this act. The evaluation shall at least include an assessment of any advantages to providing a greater number of educational choices to Ohio parents, any detrimental impacts on the state education system or on individual school districts, and the effects of attending community schools on the academic achievement of students.

* * *

SECTION 50.52. * * *
Subsection 2. * * *

(B) The General Assembly finds that the establishment of independent community schools throughout the state has potential desirable effects, including providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting. However, the potential effects of a statewide system of community schools could also generate some adverse results. Therefore, the General Assembly finds it advisable to establish a pilot project in the Lucas County area which will permit the operation of community schools in a limited area of the state in order to provide for the evaluation and measurement of the effects of these schools.

[Sec. 50.52.2 was amended in HB 770 (147 v --), however, division (B) was not changed.]

Appendix O

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.02 (Anderson 1999)

§3314.02 Proposal for converting public school to community school; new start-up school in challenged district; preliminary agreement; contract for each school.

(A) As used in this chapter:

(1) "Sponsor" means a public entity listed in division (C)(1) of this section with which the governing authority of the proposed community school enters into a contract pursuant to this section.

(2) "Pilot project area" means the school districts included in the territory of the former community school pilot project established by former Section 50.52 of Am. Sub. H.B. No. 215 of the 122nd general assembly.

(3) "Challenged school district" means any of the following:

(a) A school district that is part of the pilot project area;

(b) A school district that is in a state of academic emergency under section 3302.03 of the Revised Code;

(c) A big eight school district;

(d) An urban school district.

(4) "Big eight school district" means a school district that for fiscal year 1997 had both of the following:

(a) A percentage of children residing in the district and participating in the predecessor of Ohio works first greater than thirty per cent, as reported pursuant to section 3317.10 of the Revised Code;

(b) An average daily membership greater than twelve thousand, as reported pursuant to former division (A) of section 3317.03 of the Revised Code.

(5) "New start-up school" means a community school other than one created by converting all or part of an existing public school, as designated in the school's contract pursuant to division (A)(17) of section 3314.03 of the Revised Code.

(6) "Urban school district" means one of the state's twenty-one urban school districts as defined in division (O) of section 3317.02 of the Revised Code as that section existed prior to July 1, 1998.

(B) Any person or group of individuals may initially propose under this division the conversion of all or a portion of a public school to a community school. The proposal shall be made to the board of education of the city, local, or exempted village school district in which the public school is proposed to be converted. Upon receipt of a proposal, a board may enter into a preliminary agreement with the person or group proposing the conversion of the public school, indicating the intention of the board of education to support the conversion to a community school. A proposing person or group that has a preliminary agreement under this division may proceed to finalize plans for the school, establish a

governing authority for the school, and negotiate a contract with the board of education. Provided the proposing person or group adheres to the preliminary agreement and all provisions of this chapter, the board of education shall negotiate in good faith to enter into a contract in accordance with section 3314.03 of the Revised Code and division (C) of this section.

(C)(1) Any person or group of individuals may propose under this division the establishment of a new start-up school to be located in a challenged school district. The proposal may be made to any of the following public entities:

(a) the board of education of the district in which the school is proposed to be located;

(b) The board of education of any joint vocational school district with territory in the county in which is located the majority of the territory of the district in which the school is proposed to be located;

(c) The board of education of any city, local, or exempted village school district having territory in the same county where the district in which the school is proposed to be located has the major portion of its territory;

(d) The state board of education;

(e) If the school is proposed to be located in the pilot project area, the governing board of the educational service center serving the county containing the majority of the territory of the pilot project area;

(f) If the school is proposed to be located in the pilot project area, a sponsoring authority designated by the board

of trustees of a state university located in the pilot project area, or the board of trustees itself.

The public entity may enter into a preliminary agreement pursuant to division (C)(2) of this section with the proposing person or group.

(2) A preliminary agreement indicates the intention of a public entity described in division (C)(1) of this section to sponsor the community school. A proposing person or group that has such a preliminary agreement may proceed to finalize plans for the school, establish a governing authority for the school, and negotiate a contract with the public entity. Provided the proposing person or group adheres to the preliminary agreement and all provisions of this chapter, the public entity shall negotiate in good faith to enter into a contract in accordance with section 3314.03 of the Revised Code.

(3) A new start-up school that is established in a school district while that district is in a state of academic emergency under section 3302.03 of the Revised Code may continue in existence once the school district is no longer in a state of academic emergency, provided there is a valid contract between the school and a sponsor.

(D) A majority vote of a sponsoring school district board and a majority vote of the members of the governing authority of a community school shall be required to adopt a contract and convert the public school to a community school or establish the new start-up school. An unlimited number of community schools may be established in any school district provided that a contract is entered into for each community school pursuant to this chapter.

HISTORY: 147 v H 215 (Eff 6-30-97); 147 v S 55 (Eff 7-1-98); 147 v H 650 (Eff 7-1-98); 148 v H 282. Eff 9-28-99.

Appendix P

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.04 (Anderson 1997)

§3314.04 Exemption from state laws and rules.

Except as otherwise specified in this chapter and in the contract between a community school and a sponsor, such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents.

HISTORY: 147 v H 215. Eff 6-30-97.

Appendix Q

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.06 (Anderson 1999)

§3314.06 Admission procedures.

The governing authority of each community school established under this chapter shall adopt admission procedures that specify the following:

(A) That except as otherwise provided in this section, admission to the school shall be open to any individual age five to twenty-two entitled to attend school pursuant to section 3313.64 or 3313.65 of the Revised Code in a school district in the state.

(B) That admission to the school may be limited to students who have attained a specific grade level or are within a specific age group; to students that meet a definition of "at-risk," as defined in the contract; or to residents of a specific geographic area within the district, as defined in the contract.

(C) Whether enrollment is limited to students who reside in the district in which the school is located or is open to residents of other districts, as provided in the policy adopted pursuant to the contract.

(D) That there will be no discrimination in the admission of students to the school on the basis of race, creed, color, handicapping condition, or sex; and that, upon

admission of any handicapped student, the community school will comply with all federal and state laws regarding the education of handicapped students.

(E) That the school may not limit admission to students on the basis of intellectual ability, measures of achievement or aptitude, or athletic ability.

(F) That the community school will admit the number of students that does not exceed the capacity of the school's programs, classes, grade levels, or facilities.

(G) That, except as otherwise provided under division (B) of this section, if the number of applicants exceeds the capacity restrictions of division (F) of this section, students shall be admitted by lot from all those submitting applications, except preference shall be given to students attending the school the previous year and to students who reside in the district in which the school is located. Preference may be given to siblings of students attending the school the previous year.

Notwithstanding divisions (A) through (G) of this section, in the event the facial composition of the enrollment of the community school is violative of a federal desegregation order, the community school shall take any and all corrective measure to comply with the desegregation order.

HISTORY: 147 v H 215 (Eff 6-30-97); 148 v H 282. Eff 6-29-99.

Appendix R

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.11 (Anderson 1999)

§3314.11 State office of school options.

The department of education shall establish the state office of school options to provide advice and services for the community schools program, established pursuant to Chapter 3314. of the Revised Code, and the pilot project scholarship program, established pursuant to sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code. The office shall provide services that facilitate the management of the community schools program and the pilot project scholarship program, including providing technical assistance and information to persons or groups considering proposing a community school, to governing authorities of community schools, and to public entities sponsoring or considering sponsoring a community school.

HISTORY: 147 v S 55 (Eff 7-1-98); 148 v H 282. Eff 6-29-99.

Appendix S

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.12 (Anderson 1999)

§3314.12 Annual composite report on community schools.

The legislative office of education oversight shall produce and issue an annual composite informational report on community schools established under this chapter to the speaker of the house of representatives, the president of the senate, and the governor. The report shall include the number of schools in operation, the size and characteristics of enrollment for the schools, the academic performance of the schools, the financial status of the schools, and any other pertinent information.

HISTORY: 147 v H 770 (Eff 7-1-98); 148 v H 282. Eff 6-29-99.